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In The
Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DEMETRES J. RUDOLPH,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR A WRIT OF CERTIORARI

WILLIAM C. MIMS
Attorney General
of Virginia

STEPHEN R. MCCULLOUGH
State Solicitor General
Counsel of Record

MARTIN L. KENT
Chief Deputy
Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

JOSEPHINE F. WHALEN
Assistant Attorney General II

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Did the Supreme Court of Virginia err when, in conflict with the decisions of other courts, it invalidated a *Terry* stop by an officer who observed suspicious conduct in an area plagued by crime?

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Virginia Attorney General William C. Mims, on behalf of the Commonwealth of Virginia, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia.

INTRODUCTION

Police officers are called upon on a daily basis to patrol businesses and residential areas plagued by crime. Such patrols are necessary to ensure that the residents and businesses located in these areas can live and work in peace. Beginning with *Terry v. Ohio*,[1] this Court has recognized that the Fourth Amendment permits officers who have observed objectively suspicious conduct to act proactively, and to temporarily detain suspects to determine if a crime has been, or is about to be, committed. Most lower courts have faithfully applied this Court's *Terry* stop jurisprudence and uphold stops made by a police officer who observes suspicious activity while on patrol in a high crime area. A handful of lower courts, however, like the court below, effectively have rewritten this Court's jurisprudence and imposed a higher standard. Given the enormous practical significance of *Terry* stops to law enforcement and to the citizenry, the Court should grant certiorari to provide guidance to the lower courts.

[1] 392 U.S. 1 (1968).

OPINIONS BELOW

The decision of the Supreme Court of Virginia is published as *Rudolph v. Virginia*, 277 Va. 209, ___ S.E.2d ___, 2009 WL 485134 (2009). It is reprinted in the Appendix at 1-20. The decision of a panel of the Court of Appeals of Virginia is unpublished, *Rudolph v. Virginia,* Record No. 0240-07-1 (Va. Ct. App. Feb. 28, 2008). It is reprinted in the Appendix at 21-60.

JURISDICTION

The Supreme Court of Virginia issued its decision on February 27, 2009, and that court denied rehearing on April 24, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the Constitution of the United States, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

1. The Cypress Point Plaza Shopping Center, in the City of Virginia Beach, experienced "a lot of break-ins and robberies." *App.* 23. This crime wave prompted the police to provide extra patrols. *App.* 23. On January 23, 2006, around 8:00 p.m., a police officer was on patrol at Cypress Point. A Citgo gas station is located in the parking lot of that shopping center. *App.* 24. The officer, who was familiar with the problems in this area, noticed a vehicle parked parallel to, and in the rear of, the gas station. The car was parked in a dark area. *App.* 2, 24, 26. As shown in a photographic exhibit that was introduced at trial, the car was parked just past one of the speed bumps, and was positioned in a traffic lane rather than a parking space. The gas pumps are situated in the front of the gas station. *App.* 33. The gas station was open for business and there was a rear entrance. However, the officer knew that customers do not use that entrance in the nighttime. *App.* 24.[2]

The patrol officer noticed two persons in this unusually parked car. *App.* 24. The officer observed both occupants of the vehicle bending down several times, apparently reaching for something. *App.* 24. However, there were no lights on inside the car, nor were the car's headlights turned on. The officer decided to drive around to take a closer look. He first

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[2] The officer later learned that the back door is locked at night. *App.* 24.

decided to "take a look inside the building" to "make sure everything was fine." Tr. 07/26/06 at 17. As he continued to circle around the building, he noticed that the suspects were driving away. *App.* 2, 24. The officer then stopped the suspect vehicle. *App.* 2, 25. When the defendant stepped out of the vehicle, the officer noticed marijuana in plain sight on the floor of the car, where the defendant's leg had been. *App.* 2.

2. Rudolph was charged with possession of marijuana with the intent to distribute. *App.* 1. He filed a motion to suppress, contending among other things that the stop was improper under the Fourth Amendment. *App.* 1. The trial court denied the motion, and Rudolph entered a conditional guilty plea that allowed him to appeal the ruling on his suppression motion. *App.* 1, 21. The trial court sentenced him to serve five years in prison, with four years suspended. *App.* 63-64. Rudolph appealed to Virginia's intermediate appellate court, the Court of Appeals of Virginia.

3. A panel of that court affirmed by an unpublished opinion. *App.* 31. The court reasoned that:

> [s]everal of the circumstances that [the police officer] articulated point to the reasonable inference that the vehicle's occupants were preparing to rob the gas station. The gas station was in the parking lot of a shopping center that had recently been subject to several burglaries and robberies. Rudolph was parked in a dark, low-traffic area in a manner well-suited for a quick getaway. He

> and the passenger were bending over and reaching around the floorboard, but did not turn on the vehicle's interior lights. When Rudolph saw [the officer's] patrol car pull past him, he promptly attempted to drive away.

App. 25-26. The court found it reasonable under the circumstances for the officer to suspect "that criminal activity might be afoot," and, therefore, the officer's "stop of Rudolph's vehicle to investigate further did not violate the Fourth Amendment." *App.* 31. One judge dissented. In his view, the facts did not rise to the level of reasonable articulable suspicion. *App.* 32-60. Responding to this point, the panel majority wrote that the dissent erred by analyzing "each circumstance in isolation instead of viewing all of the circumstances together." *App.* 29. The correct analysis, the majority noted, is the "totality of the circumstances." *App.* 30.

4. The Supreme Court of Virginia granted Rudolph's appeal, and by a vote of 4-3 reversed. The court set forth the applicable standard as follows: "[i]n order to conduct an investigatory stop, a police officer need not have probable cause, he must have a reasonable suspicion, based on objective facts, that the person ***is involved*** in criminal activity." *App.* 3 (emphasis added). Further, "to establish reasonable suspicion, an officer must be able to articulate more than an unparticularized suspicion or 'hunch' that criminal activity ***is*** afoot." *App.* 3 (emphasis added). Finally, "[a] court must consider the totality of the

circumstances when determining whether a police officer had a particularized and objective suspicion that the person stopped ***was involved*** in criminal activity." *App.* 3 (emphasis added). The court concluded "that the circumstances and actions observed by [the police officer] were not enough to create a reasonable articulable suspicion that criminal activity ***was afoot.***" *App.* 4 (emphasis added). Therefore, the court held that Rudolph was stopped in violation of his "rights under the Fourth Amendment," and his suppression motion should have been granted. *App.* 4.

5. Three Justices wrote a vigorous dissent. In their view, the majority

> misapplied the law relating to investigatory stops under the Fourth Amendment, both in discounting the cumulative effect of the circumstances encountered by the police officer here, and in misconstruing the degree of suspicion required to justify such stops under *Terry v. Ohio* in a way that imposes a much heavier burden on the police than the constitution warrants.

App. 5. The dissent observed that stops based on reasonable suspicion require only "some minimal level of objective justification" for making the stop. *App.* 7 (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984)). Furthermore, the dissent noted, this Court has "often reemphasized the significant difference between the low threshold of 'reasonable suspicion' on the one hand, and the considerably more demanding

requirements of 'probable cause' and other standards." *App.* 7. In the view of the dissenting Justices, the majority failed to evaluate the "collective weight of the totality of the circumstances." *App.* 11.

Finally, the dissent argued that the majority employed an incorrect legal standard. The dissenting Justices noted that under *Terry,* a stop is proper if the officer "observes unusual conduct which leads him reasonably to conclude that criminal activity '***may*** be afoot.'" *App.* 17 (quoting *Terry*, 392 U.S. at 30). Other cases rely on this conditional language. *App.* 17 (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). Although a number of cases use the "may be afoot" formulation, the dissent observed, other decisions from this Court "have included more definitive language, suggesting that circumstances must indicate that criminal activity *is* afoot." *App.* 17 (citing *Brown v. Texas*, 443 U.S. 47, 51 (1979), *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) ("criminal activity is afoot")). Acknowledging that "there may be little theoretical difference between the two constructions," the dissent noted that "semantic differences can come to acquire great practical importance over time." *App.* 18.

> The more definite language of the latter line of cases could be easily misconstrued as a requirement that police officers have some certainty that criminal activity in fact is about to commence, is already underway, or has recently concluded. *Terry* and its progeny

> do not go so far, but the conclusion reached by the majority here suggests that it has.

App. 18.

If the majority is correct, the dissent reasoned, "this heightened requirement forecloses a vast range of legitimate investigatory practices, authorized by *Terry*, that result in only 'minimal intrusion.'" *App.* 18.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for two reasons. First, the lower courts are divided on the propriety of *Terry* stops in a scenario that occurs with great frequency. When an area or type of business has experienced ongoing criminal activity, law enforcement officers are called upon to prevent future crimes and restore stability to the area or to protect these businesses. While on patrol, police frequently will encounter behavior that is suspicious, but that nevertheless falls short of conclusive proof of criminal activity. Most courts, consistent with the balance this Court struck in *Terry*, uphold an officer's spur of the moment decision, based on objective facts, to detain a suspect briefly to determine if a crime has occurred or is about to occur. For these courts, an objective manifestation that crime *may be* afoot is sufficient to merit a brief detention. A small number of courts, however, impose a more stringent standard for such stops. Law enforcement as well as lower courts would

greatly benefit from this Court's guidance concerning where the boundaries lie.

Second, certiorari should be granted to ensure that lower courts do not consistently ignore this Court's precedents. In a series of decisions, of which the case at bar is but one example, a narrow majority of the Supreme Court of Virginia effectively has displaced the standards established by this Court in the context of *Terry* stops and substituted its own more rigorous Fourth Amendment standard. Were this decision an aberration, Virginia likely would not seek certiorari. Virginia seeks redress in this Court because of the recurring nature of the problem and its harmful practical consequences for law enforcement in the Commonwealth.

I. THE LOWER COURTS ARE DIVIDED IN THEIR APPROACH TO *TERRY* STOPS INVOLVING POLICE PATROLS IN AREAS PLAGUED BY ELEVATED LEVELS OF CRIMINAL ACTIVITY.

A. Although lower courts vary in their approach to *Terry* stops in high crime neighborhoods, a majority of courts do not take an unduly restrictive approach.

Most courts would uphold a stop based on the facts of this case. In *United States v. Edmonds*, 240 F.3d 55 (D.C. Cir. 2001), around 7:00 p.m., police officers were driving an unmarked car to patrol an

area wracked by extensive criminal activity. *Id.* at 57. Although unmarked, the vehicle was readily identifiable as a police cruiser and when an individual noticed the car, he immediately pivoted and began walking away towards a van. *Id.* The van was parked in the parking lot of a nearby closed elementary school. *Id.* As the officer approached the van, with his badge on display, he could observe the defendant in the van making furtive movements. *Id.* The officer then seized the defendant by asking for his driver's license. *Id.* On appeal, the court concluded that the stop was justified based on the combination of (1) a high crime area; (2) the way the car was parked, in this instance at a school that was closed; (3) the presence of "furtive" gestures, particularly at the approach of the police; and (4) the fact that the defendant retreated to the van at the approach of the police officer. The facts in *Edmonds* closely mirror those at issue here. The principal difference is that the school was closed in *Edmonds*, whereas the gas station here was open. But the defendant here parked in a darkened area of the parking lot, in a lane of travel suitable for a getaway. Moreover, the fact that the Citgo gas station was open does not alter the equation because the officer here was on alert for robberies.

In *United States v. Brown*, 209 Fed. Appx. 450 (5th Cir. 2006) (*per curiam*), the Fifth Circuit concluded that a *Terry* stop was proper when officers observed, around 8:30 p.m., a car parked in an apartment complex that was experiencing problems with crime,

and the suspects were seen making furtive gestures inside the car as the officers approached.

Similarly, in *United States v. Dawdy,* 46 F.3d 1427 (8th Cir. 1995), the Eighth Circuit concluded that the *Terry* stop was justified when the officers observed, around 10:00 p.m., a parked car with no lights on behind a closed pharmacy that had received several false burglary alarms in the past. In addition, the fact that the defendant drove away when the police were approaching his vehicle was an additional circumstance that supported the propriety of the stop. *See also United States v. Watson*, 953 F.2d 895 (5th Cir. 1992) (officers made a proper investigative stop when they observed defendant pull into parking lot of abandoned gas station, around 3:30 a.m., in a high crime area, turn off engine and lights, and officers observed the defendant reaching down for something after making eye contact with the police officers); *United States v. Briggman*, 931 F.2d 705 (11th Cir. 1991) (suspicion reasonable and stop proper where car was parked in commercial lot in high crime area at 4:00 a.m., and defendant began to leave when police entered the parking lot); *United States v. Rickus*, 737 F.2d 360 (3rd Cir. 1984) (stop proper when officer observed defendants traveling at a slow speed through a closed business district at 3:30 a.m., and then turned into a residential area that the officer knew had been victimized by a spate of burglaries, and continued their slow and "apparently aimless course" for several more minutes before being stopped); *Ohio v. Bobo*, 524 N.E.2d 489 (Ohio 1988)

(*Terry* stop proper based on (1) high crime nature of the area; (2) the time of night, 11:20 p.m.; and (3) the officer's observation of the defendant's head bobbing up and down at the approach of the police); *Ohio v. Freeman*, 414 N.E.2d 1044 (Ohio 1980) (stop proper when suspect seen sitting alone in a parked car for 20 minutes, with the engine turned off, in a motel parking lot at 3:00 a.m., and the officer was aware of criminal activity in the motel parking lot where suspect was stopped). The approach taken in these cases contrasts sharply with the approach taken by the Supreme Court of Virginia.

The Fourth Circuit's cases fall within the mainstream approach. In *United States v. Swain*, 2009 WL 1178522 (4th Cir.), *cert. denied*, 2009 WL 1342428 (2009) (unpublished *per curiam*), the court upheld a stop and frisk based on the fact that the suspect, upon sighting the police, immediately attempted to leave the area, the area was known for its high crime, the suspect appeared nervous, and he repeatedly put his hands in his pockets despite the officer's request that he not do so. In *United States v. Diggs*, 267 Fed. Appx. 225, 226-27 (4th Cir.) (*per curiam*), *cert. denied*, 128 S. Ct. 2520 (2008), the court upheld a stop where two individuals (1) were in a high crime neighborhood; (2) were loitering with no obvious purpose; (3) at the approach of the officers, the individuals split up to go separate directions; and (4) when the officer asked one of the suspects where he was going, he stated that he was going home but pointed in the opposite direction from where he had

been walking. In *United States v. Mayo*, 361 F.3d 802, 805-08 (4th Cir. 2004), the court found sufficient reasonable suspicion that criminal activity was afoot based on the following facts: (1) the encounter occurred in a high crime area; (2) after seeing the officers, the defendant put his hand in his pocket and appeared to be supporting something heavy; (3) the defendant turned away from the officers and headed in another direction; and (4) the defendant displayed nervous behavior. The Fourth Circuit's jurisprudence clearly differs from the Supreme Court of Virginia's decision here.

B. A few lower courts have taken the restrictive approach embraced by the Supreme Court of Virginia.

In an unpublished opinion, the Ninth Circuit held that the following facts did not suffice for a *Terry* stop: the defendant was in a vehicle late at night, in an area notorious for drug activity, at the portion of a convenience store that was closed, and he made a "hasty and nervous exit" from the vehicle when the officer shined a spotlight in the car. *United States v. Hernandez*, 149 Fed. Appx. 705, 706 (9th Cir. 2005). Judge Rawlinson dissented, contending that those facts were sufficient to justify the stop. *Id.* at 707.

The Court of Appeals of California also found that facts quite similar to the case at bar did not justify a *Terry* stop. In *California v. Perrusquia*, 58 Cal. Rptr. 3d 485 (Cal. Ct. App. 2007), the police

engaged in additional patrols of 7-Eleven convenience stores in Anaheim because six of these stores had been robbed. *Id.* at 487. The robber was described as a Black or Hispanic male in his late 20's. *Id.* While on patrol, an officer observed a car in the parking lot of a 7-Eleven around 11:26 p.m. *Id.* The car engine was idling, and the car was not parked in a regular parking space, even though there were parking spaces available closer to the store's entrance. *Id.* The occupant of the car, a Black or Hispanic male in his late 20's, was "crouched low in the driver's seat" and "leaning against the glass." *Id.* When the officers approached the car, they noticed that the defendant was "fumbling" and the officers heard a "thud." *Id.* When the suspect noticed the officers in his rear view mirror, he shut off the engine, exited the vehicle and began to walk briskly past the officers. *Id.* The Court of Appeals of California held that the stop was invalid under the Fourth Amendment, characterizing the officer's actions as based on a mere "hunch." *Id.* at 491.

A member of the panel vigorously dissented, noting that the brief detention was justified by the totality of the facts known to the police. *Id.* at 495. The dissent observed that "[r]esolving the ambiguity my colleagues see in these circumstances is the whole point of detentions." *Id.*

C. Knowing where the precise boundaries lie for *Terry* stops is of critical importance to law enforcement officers who make such stops on a daily basis.

The government has a vital interest in preventing crime, particularly violent crimes such as robberies. When the police are called upon to protect the physical safety of citizens and their property in areas victimized by crime, it is of critical importance that the police know what is and is not permissible. The decisions of the Supreme Court of Virginia, the Ninth Circuit, and the Court of Appeals of California cannot be reconciled with precedent from many other courts, including the Fourth Circuit, the Fifth Circuit, the Eighth Circuit, the D.C. Circuit, and the Supreme Court of Ohio. The Court should grant certiorari to provide guidance to law enforcement in an area that is of great practical significance.

D. The decision below is erroneous under this Court's precedent.

The decision below requires an officer to be able to point to objective facts showing that a suspect "***is*** involved in criminal activity." *App.* 3 (emphasis added). However, this Court has made it clear that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 30).

The Fourth Amendment does not impose a "more likely than not" standard, either for probable cause or for reasonable articulable suspicion. Probable cause does not "deal with hard certainties, but with probabilities," nor does it demand that an officer's reasonable belief of possible criminal activity "be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the probable-cause decision." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citation and internal brackets omitted). Not even a "prima facie showing" of criminality is required. *Illinois v. Gates*, 462 U.S. 213, 235 (1983). Instead, probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 243 n.13. "[R]easonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Wardlow*, 528 U.S. at 123. A *Terry* stop is reasonable where police harbor "a minimal level of objective justification." *Id.*

In sum,

> [t]he Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes

> that it may be the essence of good police work to adopt an intermediate response. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U.S. 143, 145-46 (1972).

The fact that the suspicious conduct might be innocent does not preclude the officers from acting. "[I]nnocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens' demands." *Gates*, 462 U.S. at 243 n.13. "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* Likewise with the lower standard of reasonable suspicion, the "determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277.

The holding of the Supreme Court of Virginia contravenes these principles. The *Terry* stop was proper here, for the reasons noted by the Court of Appeals of Virginia: (1) "the gas station was in the parking lot of a shopping center that had recently been subject to several burglaries and robberies;" (2)

the defendant "was parked in a dark, low-traffic area in a manner well suited for a quick getaway;" (3) the defendant "and the passenger were bending over and reaching around the floorboard, but did not turn on the vehicle's interior lights;" and (4) "[w]hen Rudolph saw [the officer's marked] patrol car pull past him, he promptly attempted to drive away." *App.* 25-26. In other words, at the sight of the police cruiser, he decided to leave the area. These facts justified the minimally intrusive step of a brief detention to "maintain the status quo" to confirm or dispel the officer's suspicions. *Adams*, 407 U.S. at 146. That other explanations for the defendant's behavior might be devised is irrelevant. The officer's actions were based on concrete and objective facts.

Indeed, the facts available to the officer in the present case compare favorably to those in *Terry*. In *Terry*, an experienced officer observed two individuals repeatedly pacing in front of a store, in broad daylight, peering into the window, and conferring with each other. 392 U.S. at 5-6. At one point, as the two men were conferring, a third man approached them and began speaking with them. *Id.* at 6. The officer suspected they might be casing the store to rob it. *Id.* The court upheld the stop. The court acknowledged that these acts may have been innocent in isolation, but taken together they warranted further investigation. *Id.* at 22. The facts observed by the officer here are at least as suggestive of potential criminal activity as those observed by the officer in *Terry*.

II. THE COURT SHOULD GRANT CERTIORARI TO RECTIFY WHAT HAS BECOME A PATTERN OF ERRONEOUS FOURTH AMENDMENT DECISIONS THAT NEEDLESSLY CURTAILS POLICE ACTIVITY IN VIRGINIA.

The division in the lower courts' application of *Terry* principles warrants certiorari. An additional reason for granting certiorari, however, is the fact that the Supreme Court of Virginia on an ongoing basis has imposed a higher Fourth Amendment standard than required by this Court's precedents. This Court's precedents mean nothing if they can be consistently ignored. Furthermore, the Supreme Court of Virginia's rebalancing of Fourth Amendment interests creates grave practical problems for Virginia law enforcement.

A. The Supreme Court of Virginia has raised the bar in Fourth Amendment cases in contravention of this Court's precedents.

The Supreme Court of Virginia has held that the protections afforded by the Virginia Constitution regarding searches and seizures are coextensive with those afforded by the Fourth Amendment. *See, e.g.*, *El-Amin v. Virginia*, 607 S.E.2d 115, 116 n.3 (Va. 2005). Furthermore, the court has long rejected the application of the exclusionary rule to searches or seizures that occurred in violation of the Virginia Constitution. *Hall v. Virginia*, 121 S.E. 154 (Va.

1924). Therefore, suppression motions in Virginia hinge on whether the police action violated a provision of the United States Constitution.

In a series of sharply divided 4-3 decisions, a majority of the court has adopted an expansive version of the Fourth Amendment that is contrary to this Court's jurisprudence. Last year, in *McCain v. Virginia*, 659 S.E.2d 512 (Va. 2008), the court, by a vote of 4-3, held that a *Terry* pat-down was improper under the Fourth Amendment. In *McCain*, a police officer observed two occupants of a vehicle walk up to a house and, in less than a minute, return to their vehicle. *Id.* at 514. This brief foray occurred around 3:00 a.m. *Id.* at 518. The officer observing the suspects "was familiar with the house because he was involved in a transaction 'months' earlier in which an informant made a controlled purchase of cocaine there." *Id.* at 514. In addition, the officer, who had patrolled this neighborhood for five years, was well aware that this particular neighborhood is "known for the drugs, known for shots fired, being called [in] all the time[,] . . . probably at least once a night shift." *Id.* at 515. Observing a traffic violation shortly after the vehicle drove off, the officer stopped the car. *Id.* The officer soon discovered that the driver's licenses of both the defendant and the driver of the vehicle were suspended and, therefore, the vehicle would need to be towed. *Id.* The officer then asked the defendant if he could perform a pat-down for the officer's safety. When the defendant refused, the officer nevertheless proceeded with a pat-down. *Id.*

The officer discovered an illegal gun, and the defendant was arrested. *Id.* The trial court and the Court of Appeals of Virginia upheld the officer's decision to conduct a frisk. *Id.* at 514.

A bare majority of the Supreme Court of Virginia overturned the trial court and the Court of Appeals of Virginia, concluding that the *Terry* pat-down performed during the traffic stop was invalid under the Fourth Amendment. *Id.* at 517-18. The court acknowledged that the stop itself was proper. *Id.* at 516. The court dismissed the defendant's quick entrance and exit, in less than a minute, from a house that previously had been the subject of a controlled buy of illegal drugs. The court was not swayed by the fact that the stop occurred in the early hours of the morning in a neighborhood known for its drug activity and violence—violence that was reported on a daily basis to the police. The majority characterized the objective facts as a "hunch" that did not rise to the level of reasonable articulable suspicion. *Id.* at 517.

The three dissenting Justices concluded that the officer had pointed to "specific and articulable" facts showing the suspects likely involvement in a drug transaction. *Id.* at 518. The dissenters wrote that "the confrontation between the police and the defendant occurred near 3:00 a.m., in a high crime and high drug area of the City of Danville where the police receive reports of 'shots fired . . . at least once a night shift.' [The officer who frisked the defendant for weapons] had participated months before in a

controlled drug buy in the very house he saw the defendant [and the person who accompanied him] . . . enter and within one minute return to their vehicle." *Id.* at 518. The dissent, citing to *Terry*, also stressed the imperative of officer safety in dangerous situations. *Id.* at 519.

It may be that the defendant merely was making a brief social call—to a drug house in a high crime neighborhood at 3:00 a.m. However, the officer was not unreasonable in concluding that the defendant likely was involved in a drug transaction.[3] Furthermore, the officer, who properly stopped the defendant's car, clearly was not unreasonable in performing a frisk for his own safety. *See United States v. Bustos-Torres*, 396 F.3d 935, 943 (8th Cir. 2005) ("it is reasonable for an officer to believe a person may be armed and dangerous when the person is suspected of being involved in a drug transaction"), and *United States v. Grogins*, 163 F.3d 795, 799 (4th Cir. 1998) ("the connection between illegal drug operations and guns in our society is a tight one").

Before that, in *Grandison v. Virginia*, 645 S.E.2d 298 (Va. 2007), the Supreme Court of Virginia, again voting 4-3, invalidated the fruits of a pat-down on

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[3] *See also Washington v. Doughty*, 201 P.3d 302 (Wash. Ct. App. 2009) (officers made a proper *Terry* stop after seeing the defendant enter a known drug house at 3:20 a.m. and leave after two minutes).

Fourth Amendment grounds.[4] The defendant was stopped around 5:00 a.m. because he was traveling in a car that had been reported stolen. *Id.* at 299. The stop occurred in a high crime area that was known for illegal drug activity. *Id.* Concerned for his safety, the officer conducted a pat-down for weapons. When the officer looked down, he noticed two things protruding from one of the defendant's pockets, in plain sight: first there was a drinking straw that had been cut, and second, a distinctively folded one-dollar bill. *Id.* The dollar bill was folded in an "apothecary fold."[5] The officer testified that he was familiar with the packaging and storage of drugs from his training and extensive experience as a police officer. Indeed, he was qualified as an expert in the packaging of drugs. In this capacity, the officer explained that "an apothecary fold is a method commonly used to conceal and carry contraband." The officer seized the dollar bill. *Id.* Upon laboratory testing, the substance found inside the bill proved to be cocaine. *Id.*

The Supreme Court of Virginia concluded that the officer lacked probable cause to seize the item, in violation of the Fourth Amendment. *Id.* at 299, 301. The court reasoned that the defendant

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[4] In the Court of Appeals of Virginia, a unanimous panel had upheld the search. *Grandison v. Virginia*, 630 S.E.2d 358 (Va. Ct. App. 2006).

[5] The officer described an apothecary fold as a dollar bill "folded three times lengthwise with the material, whatever it is that you're trying to hide on the inside, and then the two ends are folded over toward the middle." *Id.*

> had legal currency in his possession when [the police officer] made a *Terry* pat-down for weapons. At the time, all the officer saw was one-half of a folded dollar bill protruding from Grandison's watch pocket. . . . [T]he folded dollar bill was legal material with a legitimate purpose, even though [the officer], based on his experience, knew that dollar bills folded in a similar manner are often used as containers for drugs.

Id. at 300.

Three Justices dissented. Among other cases, the dissent cited *Texas v. Brown*, 460 U.S. 730 (1983) (plurality decision). *Grandison*, 645 S.E.2d at 322. In *Brown*, following a stop, police observed the defendant holding an opaque party balloon, knotted one-half inch from the tip. *Brown*, 460 U.S. at 733. In upholding the seizure of the item, this Court relied on the testimony of the police officer that "balloons tied in the manner of the one [in this case] were frequently used to carry narcotics." *Id.* at 743. This Court concluded that "the distinctive character of the balloon itself speaks volumes as to its contents—particularly to the trained eye of the officer." *Id.* The only difference between *Brown* and *Grandison* is that *Grandison* involved a distinctive "apothecary fold" of currency, whereas *Brown* involved a distinctive opaque balloon. In each instance, an experienced officer immediately recognized the item in plain view as indicative of drug possession. Notwithstanding the dissent and the Commonwealth's reliance on *Brown*, the majority opinion in *Grandison* does not discuss

Brown at all. And the majority simply ignored the cut straw, of the type commonly used to consume cocaine, that was found next to the folded dollar bill.[6] *Grandison*, 645 S.E.2d at 300-01.

In the wake of *Grandison*, the Supreme Court of Virginia, again by a 4-3 vote, decided *Snell v. Virginia*, 659 S.E.2d 510 (Va. 2008) (*per curiam*). In *Snell*, police lawfully detained a juvenile suspected of being a runaway. *Id.* at 510. During the detention, the police noticed and seized a dollar bill which was folded in a similar manner to the bill in *Grandison*. *Id.* Overturning the Court of Appeals of Virginia, the Supreme Court of Virginia held that *Grandison* controlled and the folded bill was insufficient to justify its seizure. *Id.* at 511. Writing for the three dissenting Justices, Justice Lemons noted that he personally examined the dollar bill at issue. *Id.* "It is tightly folded into a square measuring 1 inch by ¾ inch. By virtue of its compact folding, its thickness is significant. It is folded in a manner that would keep any powdered contents inside and unable to leak out because the fold encompasses all four sides." *Id.* The dissent criticized the majority for employing an incorrect heightened standard to invalidate the seizure. *Id.*

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[6] The Court of Appeals of Virginia, in affirming the propriety of the officer's actions, had noted that the cut straw was a further indication of drug use. *Grandison*, 630 S.E.2d at 363.

It is possible that the distinctively folded dollar bills in *Snell* and *Grandison* were innocent origami projects that just happened to be fashioned in the way that is commonly used to conceal drugs. It may also be that the suspects in *Terry*—who repeatedly walked up to a store window, looked inside, and then walked away—were merely hesitant shoppers. 392 U.S. at 6. However, as this Court repeatedly has made clear, the Fourth Amendment does not require certainty, nor does it require the police to exclude all possible hypotheses that the conduct is innocent before they can take action.

B. The current jurisprudence of the Supreme Court of Virginia stands in stark contrast to recent decisions from the Fourth Circuit.

In *Rudolph*, *McCain*, *Grandison,* and *Snell,* the Supreme Court of Virginia effectively raised the Fourth Amendment bar to a level that thwarts legitimate law enforcement activity and adversely impacts public safety. The Supreme Court of Virginia now precludes *Terry* stops or frisks if some innocent explanation can be devised for the suspect's conduct. These holdings are contrary to this Court's jurisprudence.

The Fourth Circuit, in contrast, repeatedly has stressed that "reasonable suspicion need not rule out all innocent explanations; it need only be a suspicion, albeit a reasonable one." *United States v. Black*, 525 F.3d 359, 365 (4th Cir. 2008) (upholding frisk for weapon). *See also United States v. McCoy*, 513 F.3d

405 (4th Cir.), *cert. denied*, 128 S. Ct. 2492 (2008) ("[R]easonable suspicion may exist even if each fact standing alone is susceptible to an innocent explanation. . . . Indeed, if, as the Supreme Court has stated, 'innocent behavior frequently will provide the basis for a showing of probable cause,' innocent behavior will frequently provide the basis for reasonable suspicion, a much less demanding standard, all the more.") (citation omitted); *United States v. Perkins*, 363 F.3d 317, 327 (4th Cir. 2004) ("[T]he mere fact that particular conduct may be susceptible of an innocent explanation does not establish a lack of reasonable suspicion."). Clearly, the Fourth Circuit has not embraced the heightened standard that is on display in the Supreme Court of Virginia's recent jurisprudence. This difference in approaches to *Terry* stops, if left uncorrected, will lead to forum shopping and to different outcomes based on the same or very similar facts.

C. The higher standard imposed by the Supreme Court of Virginia creates grave practical problems for law enforcement.

Virginia is not urging this Court to examine an arcane or infrequently litigated point of law. *Terry* stops are a critical tool for law enforcement. The proper articulation of the standard is vital not only to ensure that the laws are enforced and citizens are protected, but also to ensure the safety of the officers.

As the dissent pointed out below, the higher standard imposed by the Supreme Court of Virginia

> forecloses a vast range of legitimate investigatory practices. . . . Far from allowing officers the limited ability to request clarification when confronted with ambiguous circumstances, it places a weighty and unwarranted burden of proof on police to postpone any encounter until criminal culpability, at the very least probable cause to suspect a crime is underway, can be conclusively established. This is not the holding of *Terry* or the cases that have followed it.

App. 18-19.

Although States are free to "impose higher standards on searches and seizures than required by the Federal Constitution," this must be accomplished by State law, *Virginia v. Moore*, 553 U.S. ___, ___, 128 S. Ct. 1598, 1604 (2008), not by ignoring the Fourth Amendment balance struck by this Court.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

WILLIAM C. MIMS
Attorney General
of Virginia

STEPHEN R. MCCULLOUGH
State Solicitor General
Counsel of Record

MARTIN L. KENT
Chief Deputy
Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

JOSEPHINE F. WHALEN
Assistant Attorney General II

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

APPENDIX

___ S.E.2d ___, 277 Va. 209, 2009 WL 485134 (Va.)

Supreme Court of Virginia.

Demetres Jerrod RUDOLPH, Appellant,

v.

COMMONWEALTH of Virginia, Appellee.

Record No. 080794.

Feb. 27, 2009.

Upon consideration of the record, briefs, and argument of counsel, the Court is of opinion that there is reversible error in the judgment of the Court of Appeals.

Demetres J. Rudolph was charged with and found guilty of possession of marijuana with the intent to distribute in the Circuit Court of the City of Virginia Beach. By an unpublished memorandum opinion, the Court of Appeals affirmed Rudolph's conviction. Rudolph claims that he was stopped in violation of his rights under the Fourth Amendment of the United States Constitution and that all evidence obtained as a result of that stop should have been suppressed. The Commonwealth contends that, under the circumstances, the police officer's investigatory stop was constitutionally permissible.

On January 23, 2006, at approximately 8 p.m., Officer Jeremy P. Latchman was patrolling the Cypress Point Plaza Shopping Center area. Multiple burglaries of closed businesses and robberies of individuals had occurred in that area. Latchman saw a "vehicle with no lights on parked parallel in the rear of [a] Citgo Gas Station," located on an outparcel

of the shopping center. The gas station was open for business, and there was an entry door for customers in the "rear," which is the side of the building that is opposite the side of the building where the gas pumps are located. Latchman thought the circumstance of the vehicle being parked in that location was unusual because he did not believe that customers used the station's rear entry in the nighttime. In addition, while there are parking spaces on that side of the building, the vehicle was not parked in a marked parking space.

There were two people in the parked vehicle. Rudolph was in the driver's seat. In the few seconds he observed the parked vehicle from about a car length and a half away from Rudolph's vehicle, Latchman saw Rudolph moving around in the vehicle and saw Rudolph's head "[go] down a couple of times and back up." Latchman testified that Rudolph appeared to be looking or reaching for something inside the vehicle. Latchman decided to drive his marked police vehicle around the gas station to "make sure everything was fine." In doing so, he did not observe anything unusual. While Latchman was circling around the gas station, Rudolph began to drive away.

Latchman stopped Rudolph's vehicle. During the stop, Rudolph was asked to exit the vehicle; marijuana was found at the center floor divider where Rudolph's right leg had been. The discovery of that marijuana led to the conviction that is the subject of this appeal.

A defendant's claim that evidence was seized in violation of the Fourth Amendment presents a mixed question of law and fact that we review de novo on appeal. *Bolden v. Commonwealth,* 263 Va. 465, 470, 561 S.E.2d 701, 704 (2002). In making such a determination, we give deference to the factual findings of the circuit court, but we independently determine whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment. *McCain v. Commonwealth,* 275 Va. 546, 552, 659 S.E.2d 512, 515 (2008).

In order to conduct an investigatory stop, a police officer need not have probable cause; he must have a reasonable suspicion, based on objective facts, that the person is involved in criminal activity. *Ewell v. Commonwealth,* 254 Va. 214, 217, 491 S.E.2d 721, 722 (1997). To establish reasonable suspicion, an officer must be able to articulate more than an unparticularized suspicion or "hunch" that criminal activity is afoot. *Illinois v. Wardlow,* 528 U.S. 119, 123-24, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). A court must consider the totality of the circumstances when determining whether a police officer had a particularized and objective suspicion that the person stopped was involved in criminal activity. *Ewell,* 254 Va. at 217, 491 S.E.2d at 722-23. The fact that the stop occurred in a "high crime area" is a relevant factor; however, this fact is insufficient to supply a particularized and objective basis for suspecting criminal activity on the part of the particular person stopped. *Wardlow,* 528

U.S. at 124, 120 S.Ct. 673; *McCain,* 275 Va. at 552-53, 659 S.E.2d at 516.

We hold that the circumstances and actions observed by Latchman were not enough to create a reasonable articulable suspicion that criminal activity was afoot. Viewing the totality of the circumstances objectively, even though it was 8:00 p.m. and there had been robberies and burglaries in the area, the circumstances did not supply a particularized and objective basis to suspect that Rudolph's observed behavior was a precursor to a break-in, robbery, or any other criminal activity on his part. Therefore, Latchman stopped Rudolph in violation of Rudolph's rights under the Fourth Amendment. Because the marijuana was discovered as a result of an illegal stop, the trial court should have granted Rudolph's motion to suppress.

Rudolph entered a conditional guilty plea pursuant to Code § 19.2-254, which provides in part that "[i]f the defendant prevails on appeal, he shall be allowed to withdraw his plea." Rudolph has prevailed on appeal regarding suppression of the evidence in this case. He is, therefore, entitled by statute to withdraw his plea of guilty. Rudolph must be given the opportunity to reassess the admissible evidence that may be used against him and, if the Commonwealth wishes to continue its prosecution, Rudolph may demand a trial if he so desires. *See* Code § 19.2-254; *Hasan v. Commonwealth,* 276 Va. 674, 681, 667 S.E.2d 568, 572 (2008).

Accordingly, the judgment of the Court of Appeals is reversed, Rudolph's conviction in the Circuit Court of the City of Virginia Beach, case number CR06-1036, is vacated, and we will remand this case to the Court of Appeals with direction that the Court of Appeals remand the case to the circuit court for proceedings consistent with the views expressed in this order if the Commonwealth be so advised.

Justice LEMONS, with whom Justice KINSER and Senior Justice CARRICO join, dissenting.

The jurisprudence of the United States Supreme Court dealing with searches and seizures under the Fourth Amendment has always sought to strike the correct balance between protecting the constitutional rights of citizens and ensuring that law enforcement officers can take necessary action to protect the public and ensure compliance with the law.

I believe the majority today has misapplied the law relating to investigatory stops under the Fourth Amendment, both in discounting the cumulative effect of the circumstances encountered by the police officer here, and in misconstruing the degree of suspicion required to justify such stops under *Terry v. Ohio* in a way that imposes a much heavier burden on police than the constitution warrants.

I. Principles of Law

Under the Fourth Amendment, brief stops by law enforcement officers to investigate the possibility of criminal behavior may be justified by a lower standard of suspicion than is required for "a 'technical arrest' or a 'full-blown search,'" in the words of *Terry v. Ohio,* 392 U.S. 1, 19, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

> The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. Because the "balance between the public interest and the individual's right to personal security" tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "'may be afoot.'"

United States v. Arvizu, 534 U.S. 266, 273, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (citations omitted). This doctrine, which was recognized as to pedestrians in *Terry,* 392 U.S. at 30, 88 S.Ct. 1868, has been extended to stops of vehicles whose drivers are suspected of engaging in wrongdoing. *United States v. Cortez,* 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); *see also Delaware v. Prouse,* 440 U.S. 648, 663, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979). We have also recognized and applied this lower standard to

vehicle stops. *Jackson v. Commonwealth,* 267 Va. 666, 673, 594 S.E.2d 595, 598 (2004).

While "reasonable suspicion" must be based on more than an "inchoate and unparticularized suspicion or 'hunch,'" *Terry,* 392 U.S. at 27, 88 S.Ct. 1868, the United States Supreme Court has also made clear that the standard only requires "some minimal level of objective justification" for making the stop in question, *INS v. Delgado,* 466 U.S. 210, 217, 104 S.Ct. 1758, 80 L.Ed.2d 247 (1984) (citing *United States v. Mendenhall,* 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980); *Terry,* 392 U.S. at 21, 88 S.Ct. 1868). Indeed, the Court has often reemphasized the significant difference between the low threshold of "reasonable suspicion" on the one hand, and the considerably more demanding requirements of "probable cause," "a preponderance of the evidence," and "beyond a reasonable doubt" on the other. For example, in *United States v. Sokolow,* 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989), the Court noted that reasonable suspicion is "considerably less than proof of wrongdoing by a preponderance of the evidence," and "obviously less demanding than that for probable cause." And in *Alabama v. White,* 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990), the Court further explained that

> reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to

> establish probable cause, but also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause.

Id. at 330, 110 S.Ct. 2412.

Whether officers making an investigatory stop are presented with circumstances sufficiently suspicious to satisfy this minimum standard is determined by examining the totality of the circumstances in the context of the officer's experience and training. *United States v. Cortez,* 449 U.S. 411, 417-18, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981). As the Supreme Court has noted, "[t]his process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that 'might well elude an untrained person.'" *Arvizu,* 534 U.S. at 273, 122 S.Ct. 744 (quoting *Cortez,* 449 U.S. at 418, 101 S.Ct. 690).

And, as the Court has insisted since it first recognized the constitutionality of reasonable investigative stops in *Terry,* "it is imperative that the facts be judged against an objective standard," *Terry,* 392 U.S. at 21, 88 S.Ct. 1868, meaning that the officer's actual conclusion in the particular case at issue is irrelevant. Instead, reviewing courts must ask: "would the facts available to the officer at the moment of the [stop] 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Id.* at 21-22, 88 S.Ct. 1868.

This legal framework exists to guide trial courts in ruling on challenges invoking the Fourth Amendment, and to guide appellate courts in reviewing the constitutionality of those rulings. In our constitutional order, some (but not all) violations of the Fourth Amendment trigger an extreme remedy: the exclusionary rule, which, if applicable, provides that the improperly obtained evidence is inadmissible against the defendant. *See, e.g., id.* at 12-13, 88 S.Ct. 1868.

The Supreme Court has recently reemphasized the severity of the exclusionary rule and the resulting restraint courts must show when invoking it. "[E]xclusion 'has always been our last resort, not our first impulse.'" *Herring v. United States,* 555 U.S. ___, ___, 129 S.Ct. 695, 700, 172 L.Ed.2d 496 (2009) (quoting *Hudson v. Michigan,* 547 U.S. 586, 591, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006)). "'[T]he rule's costly toll upon truth-seeking and law enforcement objectives presents a high obstacle for those urging [its] application.'" *Id.* at ___, 129 S.Ct. at 701 (quoting *Pennsylvania Bd. of Probation and Parole v. Scott,* 524 U.S. 357, 364-65, 118 S.Ct. 2014, 141 L.Ed.2d 344 (1998)).

The "major thrust" of the rule is "a deterrent one," *Terry,* 392 U.S. at 12, 88 S.Ct. 1868 (citing *Linkletter v. Walker,* 381 U.S. 618, 629-35, 85 S.Ct. 1731, 14 L.Ed.2d 601 (1965)), targeting "police conduct which is overbearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution

requires," *id.* at 15, 88 S.Ct. 1868. In contrast, the rule is abused where it is "invoked to exclude the products of legitimate police investigative techniques." *Id.* at 13, 88 S.Ct. 1868.

When applied to evidence recovered pursuant to an investigatory stop, the exclusionary rule is best equipped to deter stops made not because of legitimate suspicion, but because the stop was motivated by some pernicious reason (such as racial profiling, personal animus, or the like), or by arbitrariness evidencing a genuine abuse of police power. Such a wrongful basis for the stop warrants the application of the exclusionary rule's severe penalty.

But not all investigatory stops arise from such base motivations. Indeed, the Supreme Court has explicitly recognized that conduct observed by police may be "ambiguous and susceptible of an innocent explanation" and yet still justify an investigatory stop, allowing the officers to "detain the individuals to resolve the ambiguity." *Illinois v. Wardlow,* 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000). The Court in *Wardlow* continued:

> In allowing such detentions, *Terry* accepts the risk that officers may stop innocent people. Indeed, the Fourth Amendment accepts that risk in connection with more drastic police action; persons arrested and detained on probable cause to believe they have committed a crime may turn out to be innocent. The *Terry* stop is a far more minimal intrusion, simply allowing the

> officer to briefly investigate further. If the officer does not learn facts rising to the level of probable cause, the individual must be allowed to go on his way.

Id. at 126, 120 S.Ct. 673. Applied injudiciously, the exclusionary rule improperly deters this kind of legitimate police conduct, conduct that strikes the appropriate balance between respecting the privacy citizens enjoy under our Constitution, and preserving the state's interest in preventing crime.

II. Error in Application of Law to Facts

The majority today holds that the circumstances here were insufficient to provide a reasonable suspicion for the stop that led to Rudolph's arrest. In my view, the majority has reached the incorrect conclusion given the facts of this case, in part because it ignores repeated admonishments from the United States Supreme Court and our prior cases that the constitutionality of such stops must be evaluated by examining the collective weight of the totality of the circumstances.

Here, at least four circumstances could have reasonably lent support to Officer Latchman's conclusion that criminal activity may have been afoot. First, the encounter at issue here occurred in the parking lot of a shopping center that had recently experienced a significant rise in criminal activity. As the Supreme Court has held, "officers are not required to ignore the relevant characteristics of a

location in determining whether the circumstances are sufficiently suspicious to warrant further investigation. . . . [T]he fact that the stop occurred in a 'high crime area' [is] among the relevant contextual considerations in a *Terry* analysis." *Wardlow,* 528 U.S. at 124, 120 S.Ct. 673 (citing *Adams v. Williams,* 407 U.S. 143, 144, 147-48, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972)). And indeed, the majority here concedes that "[t]he fact that the stop occurred in a 'high crime area' is a relevant factor" in the reasonable suspicion analysis. In the period leading up to this encounter, police "had beefed up a lot of extra patrol and a lot of overtime due to the fact that there w[ere] a lot of break-ins and robberies in that specific shopping center."

Second, the location of the car was unusual, and inconsistent with where and how a typical patron of the service station would be parked. The car was located on the side of the building opposite the gas pumps and main entrance to the station. Furthermore, the car was "parked parallel," not in any of the marked spaces nearby. This location was particularly odd because of the time of day; although there was a door to the station on that side of the building, in the officer's experience (unquestionably a permissible consideration in evaluating reasonable suspicion), such back doors were rarely if ever used by customers, especially at night. Finally, although it was after dark, the car's lights were off.

Third, the "furtive gestures" of the car's occupants could reasonably have raised questions about their

activities and intent. We have previously recognized that furtive gestures are relevant in determining whether probable cause exists for an arrest, *see, e.g., Hollis v. Commonwealth,* 216 Va. 874, 877, 223 S.E.2d 887, 889 (1976), and therefore they are unquestionably relevant when evaluating the lesser standard of reasonable suspicion. Here, when the officer pulled his vehicle within approximately one and a half car lengths behind the parked car, he observed two individuals within. The driver, who later turned out to be Rudolph, was "moving around in the vehicle" in a way that suggested to the officer that he might be "looking around for something." The other occupant was also "moving around in the vehicle;" the officer described the occupants' actions as "furtive movements," "reaching for stuff," and "ben[ding] down a couple of times."

Finally, the occupants' decision to depart the parking lot after encountering the officer could have been reasonably interpreted as evasion, or at least raised the possibility that was their motive. "[N]ervous, evasive behavior is a pertinent factor in determining reasonable suspicion." *Wardlow,* 528 U.S. at 124, 120 S.Ct. 673 (citing *United States v. Brignoni-Ponce,* 422 U.S. 873, 885, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975); *Florida v. Rodriguez,* 469 U.S. 1, 6, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (per curiam); *Sokolow,* 490 U.S. at 8-9, 109 S.Ct. 1581). This is especially true when coupled with other factors. *See, e.g., United States v. Briggman,* 931 F.2d 705, 709 (11th Cir.1991) (defendant was parked in lot adjacent

to closed businesses and attempted to evade police); *Losee v. Dearinger,* 911 F.2d 48, 49-50 (8th Cir.1990) (defendants were parked illegally behind closed business in high-crime area, and attempted to evade police). Here, after observing the car from close distance, the officer decided to "go around the vehicle" and around the gas station building to "make sure everything was fine." As he rounded the building on the opposite side from where Rudolph was parked, the officer immediately saw the parked car starting to drive away.

It is of course true that each of these circumstances might be wholly innocent. Indeed, when viewed in isolation from one another, it is doubtful that any of them could provide police with a reasonable suspicion that criminal activity may be afoot. However, engaging in such an exercise, as the majority implicitly does, ignores the correct application of a totality-of-circumstances test. As the Supreme Court has made clear,

> *Terry,* however, precludes this sort of divide-and-conquer analysis. The officer in Terry observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was "perhaps innocent in itself," we held that, taken together, they "warranted further investigation." 392 U.S. at 22 [88 S.Ct. 1868]. *See also Sokolow* [, 490 U.S.] at 9 [109 S.Ct. 1581] (holding that factors which by themselves were "quite consistent with

> innocent travel" collectively amounted to reasonable suspicion).

Arvizu, 534 U.S. at 274-75, 122 S.Ct. 744. The point, again, is that when viewed together, circumstances – even if wholly innocent – may be suspicious enough to warrant a reasonable officer in conducting a Terry stop in order to "resolve the ambiguity." Our cases are in perfect accord on this point. *See, e.g., Moore v. Commonwealth,* 276 Va. 747, 757, 668 S.E.2d 150, 156 (2008); *Harris v. Commonwealth,* 276 Va. 689, 695-98, 668 S.E.2d 141, 145-47 (2008); *Buhrman v. Commonwealth,* 275 Va. 501, 505, 659 S.E.2d 325, 327 (2008); *Bass v. Commonwealth,* 259 Va. 470, 475, 525 S.E.2d 921, 924 (2000). Viewed together, the circumstances here could reasonably be considered suspicious.

In a remarkably similar case, *United States v. Dawdy,* 46 F.3d 1427 (8th Cir.1995), the Court of Appeals for the Eighth Circuit considered a *Terry* stop based on an officer's observation of a vehicle parked, late at night, behind a closed pharmacy at which there had been prior reported false burglary alarms. 46 F.3d at 1428. The car's lights were off but it was occupied, and when the officer entered the parking lot to investigate, the driver of the car started the vehicle and began to drive toward the exit of the lot, at which point officers stopped the car to investigate. *Id.* at 1428-29. The Eighth Circuit held that the stop was valid, emphasizing "not merely the presence of two men sitting in a parked automobile at night," but also the prior suspicious activity in the area, the

occupants' apparent lack of a legitimate business purpose, and the occupants' potentially evasive behavior. *Id.* at 1430.

The similar circumstances here suggest the same result. Like the occupants in *Dawdy,* Rudolph and his companion were parked, late at night and with the lights off, behind a business. In *Dawdy,* there had merely been prior false burglary alarms, which could be seen as less suspicious than the confirmed robberies and break-ins here. In both cases, the likelihood of a legitimate business purpose was slight: in *Dawdy,* the officer reasonably believed the pharmacy was closed, while here Officer Latchman knew from experience that gas station customers seldom used back entrances, especially at night. When they encountered law enforcement officers, both sets of occupants attempted to make a quick exit. And the furtive gestures of Rudolph here – a factor not present in *Dawdy,* in which the stop was deemed valid – lends further support to the reasonableness of the stop here.

III. Error in Legal Standard Applied

In this case, the majority's error may reach deeper than merely misunderstanding the way the circumstances here work together to provide a reasonable suspicion. In reaching its conclusion, the majority appears to have applied a more exacting legal standard than the Fourth Amendment permits, declaring legitimate police activity unconstitutional

and upsetting the delicate balance between individual privacy and community safety.

It is possible that this divergent standard has its genesis in a slight discrepancy in the language used by the United States Supreme Court, and subsequently in our cases, in describing the reasonable suspicion standard under the Fourth Amendment. In *Terry,* the Supreme Court explicitly stated its holding, including the following language: "We merely hold today that where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity *may be* afoot," an investigatory stop is warranted. *Terry,* 392 U.S. at 30, 88 S.Ct. 1868 (emphasis added). Some later cases utilize the same conditional language. *See, e.g., Sokolow,* 490 U.S. at 7, 109 S.Ct. 1581 ("may be afoot"); *Arvizu,* 534 U.S. at 273, 122 S.Ct. 744 ("may be afoot").

However, other reasonable suspicion cases have included more definitive language, suggesting that circumstances must indicate that criminal activity *is* afoot, or that a suspect is involved in criminal activity. These cases include *Brown v. Texas,* 443 U.S. 47, 51, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979) ("is involved in criminal activity") and *Wardlow,* 528 U.S. at 123, 120 S.Ct. 673 ("criminal activity is afoot").

This disparity is reflected in our cases. *Compare, e.g., Moore,* 276 Va. at 757, 668 S.E.2d at 155 ("may be afoot"); *McCain v. Commonwealth,* 275 Va. 546, 552, 659 S.E.2d 512, 516 (2008) ("may be afoot") *with*

Harris, 276 Va. at 697, 668 S.E.2d at 147 ("is involved in criminal activity"); *Bass,* 259 Va. at 475, 525 S.E.2d at 923 ("is afoot"). In at least one case, both kinds of language are used in subsequent sentences. *See Ewell,* 254 Va. at 217, 491 S.E.2d at 722-23 ("In order to justify the brief seizure of a person by an investigatory stop, a police officer . . . must have a reasonable suspicion, based on objective facts, that the [person] is involved in criminal activity. In determining whether a police officer had a particularized and objective basis for suspecting that the person stopped *may be* involved in criminal activity, a court must consider. . . ." (emphases added) (citations and quotation marks omitted)).

These examples suggest that there may be little theoretical difference between the two constructions. However, semantic differences can come to acquire great practical importance over time. The more definite language of the latter line of cases could be easily misconstrued as a requirement that police officers have some certainty that criminal activity in fact is about to commence, is already underway, or has recently concluded. *Terry* and its progeny do not go so far, but the conclusion reached by the majority here suggests that it has.

If so, this heightened requirement forecloses a vast range of legitimate investigatory practices, authorized by *Terry,* that result in only "minimal intrusion." Far from allowing officers the limited ability to request clarification when confronted with ambiguous circumstances, it places a weighty and

unwarranted burden of proof on police to postpone any encounter until criminal culpability, or at the very least probable cause to suspect a crime is underway, can be conclusively established. This is not the holding of *Terry* or the cases that have followed it, and the majority's implementation of this foreign requirement, which is implicit in its resolution of this case, is error.

In this case, the majority does not properly apply the principles articulated by the United States Supreme Court in evaluating *Terry* stops. The United States Supreme Court has long made clear that states are permitted to provide greater protections to their citizens than the minimal levels guaranteed by the federal Constitution; however, they must do so by means of state law, whether embodied in state statute or state constitution. *Danforth v. Minnesota,* 552 U.S. ___, ___, 128 S.Ct. 1029, 1046, 169 L.Ed.2d 859 (2008) (citing *Oregon v. Hass,* 420 U.S. 714, 95 S.Ct. 1215, 43 L.Ed.2d 570 (1975); *Tarble's Case,* 80 U.S. 397, 13 Wall. 397, 20 L.Ed. 597 (1872); *Ableman v. Booth,* 62 U.S. 506, 21 How. 506, 16 L.Ed. 169 (1859)). States are free to "impose higher standards on searches and seizures than required by the Federal Constitution," but this must be accomplished by state law. *Virginia v. Moore,* 553 U.S. ___, ___, 128 S.Ct. 1598, 1604, 170 L.Ed.2d 559 (2008) (quoting *Cooper v. California,* 386 U.S. 58, 62, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967)).

IV. Conclusion

For all the forgoing reasons, I believe the Court of Appeals was correct in affirming the trial court's denial of Rudolph's motion to suppress and in affirming his conviction. Accordingly, I would affirm the judgment of the Court of Appeals.

This order shall be published in the Virginia Reports and shall be certified to the Court of Appeals and the said circuit court.

A Copy,

Teste:

Patricia L. Harrington, Clerk

COURT OF APPEALS OF VIRGINIA

Present: Judges Humphreys, Clements and Haley
Argued at Chesapeake, Virginia

DEMETRES JERROD RUDOLPH

v. Record No. 0240-07-1

COMMONWEALTH OF VIRGINIA

MEMORANDUM OPINION* BY JUDGE ROBERT J. HUMPHREYS
FEBRUARY 26, 2008

FROM THE CIRCUIT COURT
OF THE CITY OF VIRGINIA BEACH
A. Bonwill Shockley, Judge

Melinda R. Glaubke (Slipow, Robusto & Kellam, P.C., on brief), for appellant.

Josephine F. Whalen, Assistant Attorney General II (Robert F. McDonnell, Attorney General, on brief), for appellee.

Demetres J. Rudolph ("Rudolph") appeals his conviction, following his conditional guilty plea, for possession of marijuana with intent to distribute, in violation of Code § 18.2-248.1. Rudolph argues that the trial court erred by not suppressing marijuana found in his vehicle. Rudolph claims that the stop of his vehicle that resulted in the discovery of the marijuana violated the Fourth Amendment to the United States Constitution because the stop was not

* Pursuant to Code § 17.1-413, this opinion is not designated for publication.

based on reasonable suspicion. We disagree and affirm the decision of the trial court.

ANALYSIS

The sole issue on appeal is whether Officer Jeremy Latchman's stop of Rudolph's vehicle was permissible under the Fourth Amendment. The permissibility of a traffic stop under the Fourth Amendment is a "mixed question of law and fact." *Ornelas v. United States*, 517 U.S. 690, 696 (1996). Accordingly, "we are bound by the trial court's findings of historical fact unless 'plainly wrong' or without evidence to support them and we give due weight to the inferences drawn from those facts by resident judges and local law enforcement officers." *McGee v. Commonwealth*, 25 Va. App. 193, 198, 487 S.E.2d 259, 261 (1997) (*en banc*). However, we review the trial court's application of the Fourth Amendment to those facts *de novo*. *See Ornelas*, 517 U.S. at 691.

The Fourth Amendment "does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989). In *Terry v. Ohio*, 392 U.S. 1 (1968), the Supreme Court of the United States "held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). "Reasonable, articulable suspicion" requires more than an officer's "inchoate

and unparticularized suspicion or 'hunch.'" *Terry,* 392 U.S. at 17. However, it requires "considerably less than proof of wrongdoing by a preponderance of the evidence" and "obviously less" than probable cause. *United States v. Sokolow,* 490 U.S. 1, 7 (1989). To justify a *Terry* stop, "the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry,* 392 U.S. at 21.

"It is well established that whether reasonable suspicion 'exists to warrant an investigatory stop is determined by the totality of the circumstances.'" *Gregory v. Commonwealth,* 22 Va. App. 100, 107, 468 S.E.2d 117, 121 (1996) (quoting *Smith v. Commonwealth,* 12 Va. App. 1100, 1103, 407 S.E.2d 49, 51 (1991)). Some of the circumstances this Court has considered include "an obvious attempt to avoid officers,'" *Williams v. Commonwealth,* 4 Va. App. 53, 67, 354 S.E.2d 79, 87 (1987), the "defendant's presence in a high crime area," *Brown v. Commonwealth,* 15 Va. App. 232, 235 n.1, 421 S.E.2d 911, 912 n.1 (1992), and any "furtive movements and suspicious conduct" of the defendant, *Purdie v. Commonwealth,* 36 Va. App. 178, 186, 549 S.E.2d 33, 37 (2001).

On the night in question, Officer Latchman was patrolling at a shopping center because the police department "had beefed up a lot of extra patrol and a lot of overtime due to the fact that there w[ere] a lot of break-ins and robberies in that specific shopping

center." A gas station was located in the parking lot of that shopping center. Officer Latchman saw Rudolph and another man in "a vehicle with no lights on parked parallel in the rear" of the gas station.[1] Officer Latchman found it "unusual" that Rudolph was parked behind the building because, although there is a rear entrance, "[t]he front of the building is where all the customers come in" and "no one enters [the rear entrance] at nighttime."[2] Officer Latchman also noted that, although there were marked parking spots near Rudolph's car, he was not parked in any of them.

Driving his marked police vehicle, Officer Latchman stopped approximately one to one-and-one-half car lengths behind Rudolph and watched the vehicle for several seconds. As he watched the car, he saw both passengers making "furtive movements." The two men "bent down a couple of times" and it "looked like they were reaching for stuff." Officer Latchman

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[1] Due to the layout of the gas station and the parking lot, it is difficult to say whether Rudolph was parked in the rear of the building or along its side. However, whether he was parked on the side or in the rear does not affect our analysis. It is sufficient for us to say that Rudolph was parked on the side of the building that is opposite the gas pumps and the main entrance to the gas station.

[2] Although Officer Latchman later learned that the rear entrance is locked at night, he testified that it was "unusual" for someone to use the rear entrance at night based on his own experience of "observing gas stations." He explained that it was his experience that "[t]he customers go through the front door, not through the back."

decided to drive around the gas station to "make sure everything was fine." As Officer Latchman proceeded around the building, Rudolph pulled away from the curb and began to leave.

Rudolph argues and the dissent agrees that those circumstances are not sufficient to create reasonable suspicion. We disagree. Several of the circumstances that Officer Latchman articulated point to the reasonable inference that the vehicle's occupants were preparing to rob the gas station. The gas station was in the parking lot of a shopping center that had recently been subject to several burglaries and robberies.[3] Rudolph was parked in a dark, low-traffic

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[3] Contrary to the dissent's assertions, we make no claim that the gas station was located in a general "high crime" area. There is no evidence in the record that overall criminal activity is higher in this neighborhood than in other parts of Virginia Beach. Rather, as part of a reasonable suspicion analysis, we merely acknowledge Officer Latchman's testimony that the police department "had beefed up a lot of extra patrol and a lot of overtime due to the fact that there w[ere] a lot of break-ins and robberies in that specific shopping center." We disagree with the dissent that the recent history of burglaries and robberies in that location has only "marginal significance" in the investigation of crime in the area. By way of analogy, the fact that people have attempted to smuggle dangerous items onto airplanes has certainly more than "marginal significance" in an analysis of whether it is reasonable for agents of the federal government to search the carry-on luggage of airline passengers before they board a plane. The fact that Officer Latchman observed actions consistent with the preparation for a robbery when coupled with the fact that several robberies had recently occurred in that specific location is most certainly significant to any reasonable suspicion analysis.

area in a manner well-suited for a quick getaway. He and the passenger were bending over and reaching around the floorboard, but did not turn on the vehicle's interior lights. When Rudolph saw Officer Latchman's patrol car pull past him, he promptly attempted to drive away.

Based on all of those circumstances, the trial court did not err in finding that it was reasonable to suspect "that criminal activity may be afoot." *Terry*, 392 U.S. at 17. Officer Latchman had been assigned to that shopping center specifically because of recent and repeated occurrences of a crime, the imminent commission of which was consistent with Officer Latchman's observations. Reasonable suspicion sufficient to allow a police officer to investigate does not arise only after the commission of a crime. *Harmon v. Commonwealth*, 15 Va. App. 440, 444, 425 S.E.2d 77, 79 (1992) ("Actual proof that criminal activity *is* afoot is not necessary; the record need only show that it *may* be afoot." (emphasis in original)). To require a level of suspicion greater than that present in this case would be to effectively replace the requirement of reasonable suspicion with the higher standard of probable cause.

We disagree with the dissent's view that a finding of reasonable suspicion in this case is inconsistent with the holding of our Supreme Court in *Ewell v. Commonwealth*, 254 Va. 214, 491 S.E.2d 721 (1997). The circumstances that Officer Latchman observed in this case are significantly more suspicious than the circumstances of *Ewell*. In *Ewell*,

the only "suspicious" facts were that the suspect was parked late at night in an apartment complex "suspected of 'high narcotics' trafficking," the officer did not recognize the driver or the vehicle, and the vehicle attempted to leave upon the officer's arrival. *Id.* at 216, 491 S.E.2d at 722. The officer in *Ewell* did not observe any additional actions consistent with the trafficking of drugs. In fact, the Court specifically noted, "Although the automobile was parked in an area suspected of 'high narcotics' trafficking and it exited the parking lot upon [the officer's] arrival in a police vehicle, nothing about Ewell's conduct was suspicious." *Id.* at 217, 491 S.E.2d at 723.

The facts in this case are quite different. Here, as in *Ewell,* the officer observed the suspect parked at night in a high crime area and the suspect attempted to leave the parking lot shortly after the arrival of the police vehicle. However, the officer in this case, unlike the officer in *Ewell,* also observed several facts consistent with, and preparatory to, the very type of crime that had recently been occurring in that shopping center and which he had been assigned to prevent. Considering the specific recent history of robberies and burglaries and Rudolph's conduct consistent with that of a person preparing to commit that specific crime, the facts before us today are clearly more suspicious than the facts of *Ewell.* Thus, we reject the dissent's assertion that our decision today is inconsistent with *Ewell.*

The dissent also cites our recent case, *Asble v. Commonwealth,* 50 Va. App. 643, 653 S.E.2d 285

(2007), as proof that Rudolph's movements inside his vehicle did not create reasonable suspicion. We agree that Rudolph's movements inside his vehicle did not in and of themselves give rise to reasonable suspicion. Rather, his movements were simply one of several factors that created reasonable suspicion. *Asble* is factually distinct from this case and does not dictate that the act of repeatedly bending down and reaching around the floorboard of a car cannot be considered as one factor among many that may together constitute reasonable suspicion. In *Asble,* reasonable suspicion did not exist because, unlike in this case, a furtive movement by a passenger of a parked car was the *only* suspicious circumstance the investigating officer could articulate. In *Asble,* a police officer observed a vehicle parked on the shoulder of an entrance ramp of a highway late at night. As he approached the vehicle the officer observed the driver "bend toward the floorboard, making a motion with his arm." *Id.* at 646, 653 S.E.2d at 286. When the officer arrived at the vehicle he saw a woman lying across the back seat and "'asked were they okay.'" *Id.* The driver told the officer that the woman was his wife and that she was sick. Without asking any further questions, the officer asked the driver to get out of the car and initiated a *Terry* stop. We held that the officer did not have reasonable suspicion because, under the circumstances, the driver's act of bending over and reaching around did not create reasonable suspicion by itself. However, nothing in *Asble* mandates that it is improper to consider bending down and reaching

around the floorboard of a car as one of many factors in a reasonable suspicion analysis as we do here.[4]

The dissent's essential argument is that, because no one particular circumstance of this case gives rise to reasonable suspicion, reasonable suspicion must not exist. The flaw in that reasoning is that it analyzes each circumstance in isolation instead of viewing all of the circumstances together. Both the United States Supreme Court and the Virginia Supreme Court have continuously recognized that the

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[4] The dissent also cites *Asble* in raising a concern that Officer Latchman did not identify the particular offense that he suspected Rudolph of committing. That concern is, however, without basis.

> "It is important to remember that we are not limited to what the stopping officer says or to evidence of his subjective rationale; rather, we look to the record as a whole to determine what facts were known to the officer and then consider whether a reasonable officer in those circumstances would have been suspicious."

Raab v. Commonwealth, 49 Va. App. 638, 642 n.4, 644 S.E.2d 78, 82 n.4 (2007) quoting *United States v. Brown*, 232 F.3d 589, 594 (7th Cir. 2000)). "The validity of a seizure 'turns on an objective assessment of the officer's actions in light of the facts and circumstances confronting him at the time, and not on the officer's actual state of mind at the time the challenged action was taken.'" *Welshman v. Commonwealth*, 28 Va. App. 20, 30, 502 S.E.2d 122, 137 (1998) (*en banc*) (quoting *Maryland v. Macon*, 472 U.S. 463, 470-71 (1985)). "The fact that the officer does not have the state of mind which is hypothecated by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *Whren v. United States*, 517 U.S. 806, 813 (1996).

determination of reasonable suspicion is based on the totality of the circumstances available to the officer. *See United States v. Arvizu,* 534 U.S. 266, 273 (2002) ("When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the 'totality of the circumstances' of each case to see whether the detaining officer has a 'particularized and objective basis' for suspecting legal wrongdoing."); *Whitfield v. Commonwealth,* 265 Va. 358, 361, 576 S.E.2d 463, 465 (2003) ("To determine whether a police officer had a particularized and objective basis for suspecting that the person stopped may be involved in criminal activity, a court must consider the totality of the circumstances."). "Under the Fourth Amendment, 'the relevant inquiry is not whether particular conduct is "innocent" or "guilty," but the degree of suspicion that attaches to particular types of noncriminal acts.'" *Raab v. Commonwealth,* 49 Va. App. 638, 644-45, 644 S.E.2d 78, 81-82 (2007). *Terry* itself recognized that each individual action that contributes to reasonable suspicion may be "innocent in itself," but "taken together" the circumstances may "warrant further investigation." *Terry,* 392 U.S. at 23. Put another way, *Terry* and its progeny recognize that the question is not whether there might be an innocent explanation for the facts and circumstances that give rise to an officer's suspicion of criminal activity as the dissent seems to suggest, but rather whether the facts and circumstances are such that it is reasonable for the officer to investigate further to determine whether that is indeed the case. *See Arvizu,* 534 U.S. at 277

("A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct."); *Raab*, 49 Va. App. at 643, 644 S.E.2d at 81 ("The possibility – even a more-likely-than-not probability – of an innocent explanation for the conduct does not necessarily forbid an officer from making a brief, investigatory stop."). The dissent goes to great lengths to single out individual circumstances and point out that, standing alone, none of them give rise to reasonable suspicion. That, however, is not the issue. The question we must answer is whether, under the *totality of the circumstances*, Officer Latchman had reasonable suspicion to believe that criminal activity was afoot. We hold that he did.

CONCLUSION

Viewing all of the facts available to Officer Latchman – the time of day, the location of Rudolph's vehicle in relation to the gas station, the recent history of burglaries and robberies at that location, Rudolph's movements in the vehicle, and Rudolph's attempt to leave after a marked police vehicle pulled out from behind him – it is clear that he had reasonable suspicion to believe that "criminal activity might be afoot." *Terry*, 392 U.S. at 30. Thus, Officer Latchman's stop of Rudolph's vehicle to investigate further did not violate the Fourth Amendment. We therefore affirm the decision of the trial court.

Affirmed.

Haley, J., dissenting.

Today the majority holds that the Fourth Amendment permits the police to detain persons who reach for things inside their automobiles, while parked near the entrance to an open business, provided they do so in a "high crime" neighborhood and drive away shortly after they are seen by the police. I dissent because I think this conclusion is inconsistent with the Fourth Amendment.

FACTS

Appellant's vehicle was parked next to the Citgo gas station and convenience store in the shopping center with its headlights off. Officer Latchman described the location of appellant's vehicle as "in the rear of" the Citgo station, and it is true that the car was parked on the side of the station opposite the gasoline pumps. Yet, during his testimony at the suppression hearing, Officer Latchman marked photographs of the exterior of the gas station at the spot on the photograph where he first saw appellant's parked car. The marks on these photographs demonstrate that appellant's car was parked only a few steps away from one of the doorways into the station. A speed bump is visible in one of the photos immediately in the path of appellant's car. The majority mentions, in its analysis, the officer's testimony that it would have been unusual for a customer not to use the other door next to the

gasoline pumps. On this point, the majority ignores the following testimony:

> A: Yes sir. In the back of the building, no one enters at nighttime. The front of the building is where all the customers come in. So it would have been unusual for the vehicle to be parked there. Based on those circumstances, that's why I stopped the vehicle.
>
> Q: And that's the only other question I had. The back door, is that open at night?
>
> A: No.
>
> Q: Just the front area by the pumps?
>
> A: Yes. Because there was only one clerk in there at the time.
>
> * * *
>
> RECROSS-EXAMINATION
>
> Q: How do you know that?
>
> A: I can tell you from – from both – both of us speaking to the clerk.
>
> Q: Okay. But this was after this arrest?
>
> A: Well, it was while the whole investigation was going on.
>
> Q: Okay. You did not have that information prior to making the stop? You learned afterwards that by asking the clerk was the

door locked? You learned that after the investigation?

A: Right.

The photographs also display advertisements for cigarettes in the exterior windows of the Citgo station, adjacent to the door where appellant had stopped, signifying their availability for sale to customers who might come through the door. Officer Latchman testified that the station was still open for business when he saw appellant's vehicle. He also testified that he was on patrol because there had been a number of burglaries and robberies in the shopping center. However, he was not investigating any specific crime. Nor had anyone from the Citgo station called the police to report any suspicious behavior by appellant or by anyone else. Officer Latchman was driving his marked police vehicle through the gas station parking lot. He recounts what happened next.

Q: While you were observing the defendant sitting in the vehicle there at the rear, did you notice anything about his demeanor or actions?

A: While I was sitting directly behind the vehicle, I observed the defendant. He appeared to be moving around in the vehicle. His head went down a couple of times and back up. I don't know if he was looking around for something or what else was going on in the vehicle at the time.

Q: You said while you were sitting behind him. How close were you sitting behind him?

A: Probably, I would say, about a car length or a car length and a half.

* * *

Q: Okay. And how long did you sit there behind him?

A: Just for a few seconds.

Q: What did you do next after sitting there observing his movements?

A: I decided to go around the vehicle and make sure everything was fine, just take a look inside the building as I drove by and make sure everything was fine. When I came around the front, I observed the vehicle start moving away.

Q: Okay. What did you do upon observing that?

A: Upon observing him parked, before he left the lot, I pulled up behind him and initiated the investigation on the vehicle and what was going on back at the end of the building.

Officer Latchman activated his emergency equipment and stopped appellant's car. There was no evidence that appellant had seen Officer Latchman before the officer initiated the stop.

ANALYSIS

The majority begins its analysis by correctly identifying our standard of review, and quoting the well-settled proposition that police may briefly stop and detain persons if, based on the totality of the circumstances, they have a reasonable, articulable suspicion of criminal activity. *Terry v. Ohio,* 392 U.S. 1, 17 (1968). Next they cite cases identifying some factors that are sometimes relevant to the reasonable suspicion analysis. At this point in the opinion, the majority mentions three factors: attempting to avoid officers, presence in a "high crime area," and the more generic "furtive movements and suspicious conduct."

I conclude that the cases from which the majority collects these factors are substantially distinguishable from this case. Thus, the majority's reliance upon them is unpersuasive. For example, *Brown v. Commonwealth*, 15 Va. App. 232, 421 S.E.2d 911 (1992), is not even a Fourth Amendment case. It addresses instead the circumstances under which a police officer's testimony about the reputation of a neighborhood for illegal drug trafficking can be admissible evidence in a jury trial for drug possession with the intent to distribute. *Id.* at 234, 421 S.E.2d at 912. The subject of investigative stops is mentioned only in the footnote cited by the majority, very briefly, and only to point out that, "the defendant's presence in a high crime area, standing alone, does not provide the requisite degree of suspicion to justify an investigatory stop." *Id.* at 234 n.1, 421 S.E.2d at 912 n.1. The decision is not very instructive as to whether

and, if so, why and to what extent the "high crime" neighborhood around the Citgo station was relevant to Officer Latchman's stop of appellant under the totality of the circumstances in our case.

Purdie v. Commonwealth, 36 Va. App. 178, 549 S.E.2d 33 (2001), also cited in the majority opinion, is not a vehicle stop case either. "Purdie does not challenge the stop of the vehicle in which he was a passenger, the request for him to exit the vehicle, or the initial patdown conducted by Officer Conigliaro." *Id.* at 185, 549 S.E.2d at 36. Instead, the *Purdie* decision decided that the police had probable cause to search the defendant's pocket. *Id.* at 186, 549 S.E.2d at 37. The defendant was known to the police for having previously stabbed an officer and for having previously thrown away narcotics while attempting to flee the police. *Id.* at 182, 549 S.E.2d at 35. After the stop, the defendant appeared to be nervous; he walked with a hunched posture that obscured the view of his waistband/groin area when the officers were in front of him and resumed a normal posture when his back was to the officers. He repeatedly pushed his hands into his pockets and brought them out of his pockets again with his fists clenched around something while looking 360 degrees around him, and he finally swallowed something concealed in his hand when subjected to a pat down by police. *Id.* at 183-84, 549 S.E.2d at 36. It is helpful to read the language from the majority's quotation in its full context: "Based upon the totality of the circumstances, consisting of furtive movements and

suspicious conduct, which culminated in Purdie swallowing something that had been hidden in his hand, [the officer] had probable cause to believe that Purdie had disposed of an illegal substance." *Id.* at 186, 549 S.E.2d at 37. There is nothing in the record before us demonstrating "furtive movements and evasive behavior" remotely approaching the circumstances of suspicion in *Purdie*.

Williams v. Commonwealth, 4 Va. App. 53, 58-59, 354 S.E.2d 79, 82 (1987), addresses, among other issues, the stop of a motorist who had been accused of cocaine distribution by two confidential police informants, informants who identified the motorist's alleged accomplice and cocaine supplier, described the make and model year of the motorist's car, described the way he allegedly received the cocaine, and identified the specific address from which he allegedly sold the cocaine. A detective also conducted a record check and learned that this particular motorist had a drug-related criminal history in South Carolina, which, according to the confidential informants, was the very place from which the defendant's drug supplier mailed him the drugs. *Id.* The police stopped the defendant when they saw him driving away from his house at the same time other police were on the way to that house to serve a search warrant issued by a neutral magistrate upon an affidavit which included the details provided by the confidential informants and the results of the criminal record check. *Id.* at 59, 354 S.E.2d at 82.

This Court's decision in *Williams* held that the police had a reasonable suspicion to stop the defendant's vehicle. *Id.* at 65, 354 S.E.2d at 85-86. The paragraph in the *Williams* opinion analyzing the vehicle stop is devoted entirely to the circumstances focusing suspicion on the individual motorist: the information provided by the confidential informants, the record check, and the search warrant. *Id.* The paragraph does not even mention the defendant's driving away from the house. *Id.* I do not believe *Williams* provides any meaningful support for Officer Latchman's stop of appellant.

APPELLANT'S "FURTIVE MOVEMENTS"

The majority mentions appellant's movements in their decision to affirm the trial court. I believe this decision is inconsistent with our recent decision in *Asble v. Commonwealth*, 50 Va. App. 643, 653 S.E.2d 285 (2007). *Asble* is instructive on the issue of whether appellant's "furtive movements" justified the seizure in this case. In *Asble*, a police officer saw the defendant and a passenger inside a nonmoving car, shortly before midnight, on the shoulder lane of an entrance ramp onto Interstate 264. The police officer testified that, as he approached the car, he saw the defendant bend toward the floorboard and move his arm. *Id.* at 646, 653 S.E.2d at 286. The officer asked the defendant what he was doing on the shoulder of the entrance ramp, and the defendant replied that his wife was sick. *Id.* at 646-67, 653 S.E.2d at 286. The officer then removed the defendant from the car and

frisked him for weapons. *Id.* at 647, 653 S.E.2d at 286. We held that the trial court erred in failing to grant the defendant's motion to suppress evidence recovered as a result of the stop because the officer did not have a reasonable suspicion that the defendant was engaged in criminal activity. *Id.* at 649, 653 S.E.2d at 287-88. *Asble* assists our analysis of this case because that decision analyzed the defendant's "furtive gesture" toward the floorboard and concluded that it did not create a reasonable suspicion of criminal activity. *Id.* at 649, 653 S.E.2d at 288. "[The officer] noted only that 'sometimes' when movement such as he saw occurs, weapons and/or narcotics are present. This was, at best, a mere hunch, not a particularized suspicion flowing reasonably from articulable facts." *Id.*

I do not believe the majority's attempt to distinguish *Asble* is persuasive. They merely follow a summary of the facts with this statement: "[N]othing in *Asble* mandates that it is improper to consider bending down and reaching around the floorboard of a car as one of many factors in the reasonable suspicion analysis." This is true enough, but not very helpful. It does not explain why this Court should allow the stop in this case when we found the stop in *Asble* to violate the Constitution. Both stops came after "furtive movements," late at night, by a person who was in a parked car with a passenger. What additional factor makes this case so meaningfully different that we should reach the opposite result? The majority's determination that the stop in this

case was justified suggests that they find the defendant's presence in a "high crime" area to be the decisive factor.

THE SIGNIFICANCE OF A HIGH CRIME AREA

Accordingly, I shall analyze under what circumstances can a person's presence in a "high crime" area ever reasonably heighten the circumstances of suspicion surrounding a particular individual. This is an important question because, though they do not say so explicitly, the majority's position suggests that they believe that the stop in *Asble* would pass constitutional muster if it had taken place in the parking lot of the Citgo station. In deciding this question, our guide must be the principles laid down in prior cases and a careful recognition of how such cases have applied the defendant's presence in a "high crime area" to the reasonable suspicion analysis. It is a good start to remember that, except for certain checkpoint and roadblock cases not applicable here, the reasonableness of a Fourth Amendment seizure depends upon circumstances tending to focus suspicion on the specific individual seized. *Delaware v. Prouse,* 440 U.S. 648, 663 (1979); *Leeth v. Commonwealth,* 223 Va. 335, 340, 288 S.E.2d 475, 478 (1982) (citing *United States v. Cortez,* 449 U.S. 411, 417-18 (1981)); *Giles v. Commonwealth,* 32 Va. App. 519, 523, 529 S.E.2d 327, 329 (2000) (citing *Jacques v. Commonwealth,* 12 Va. App. 591, 593, 405 S.E.2d 630, 631 (1991)).

There is an undeniable tension between the public character of a neighborhood's reputation for criminal activity and a legal standard that requires "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Riley v. Commonwealth*, 13 Va. App. 494, 498, 412 S.E.2d 724, 727 (1992) (quoting *Cortez*, 449 U.S. at 417). Perhaps this is the reason, in an area of the law featuring very few bright-line rules, and dominated by a case-by-case, totality of the circumstances approach, a person's presence in a "high crime" area is one of the few factors that can never, by itself, be decisive. *Brown v. Texas*, 443 U.S. 47, 52 (1979); *Goodwin v. Commonwealth*, 11 Va. App. 363, 398 S.E.2d 690 (1990).

> "[T]housands of citizens live and go about their legitimate day to-day activities in areas which surface . . . in court testimony, as being high crime neighborhoods. The fact that the events here at issue took place at or near an allegedly 'high narcotics activity' area does not objectively lend any sinister connotation to facts that are innocent on their face."

Riley, 13 Va. App. at 498, 412 S.E.2d at 726-27 (quoting *Smith v. United States*, 558 A.2d 312, 316 (D.C. App. 1989)). "Even in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be

conducted." *Maryland v. Buie,* 494 U.S. 325, 334 n.2 (1990).

While the phrase "high crime area" appears frequently in Virginia decisions, it is rarely discussed at length. Nor do the cases that do mention it explain when, if ever, the defendant's presence in a high crime area makes the difference between circumstances where a seizure would be unreasonable and circumstances justifying a *Terry* stop. This Court has, however, considered the criminal reputation of the area in upholding a *Terry* stop of a man standing, at night, in an area with a reputation for drug activity, who made eye contact with a passing police officer, and then attempted to shove something into the pocket of the person next to him, who refused to accept whatever it was. *Walker v. Commonwealth,* 42 Va. App. 782, 595 S.E.2d 30 (2004). We also mentioned this factor in deciding that a police officer had reasonable suspicion to stop a man the officer saw handing items, which the officer could not see, to a few different women, after two o'clock in the morning, outside an apartment building in a "high-crime area"; another police officer also noticed that the man handed a large wad of money to another man who went into the apartment building; both officers had heard shooting in the area and noticed empty shell casings on the ground near the man. *Kidd v. Commonwealth,* 38 Va. App. 433, 565 S.E.2d 337 (2002).

It is also important to consider our precedents reversing fruits of unlawful *Terry* stops, despite police

testimony that the defendant was present in a "high crime" area. One of these cases is *Ewell v. Commonwealth*, 254 Va. 214, 491 S.E.2d 721 (1997), which the majority attempts to distinguish from this case. In *Ewell*, a police officer noticed the defendant in the parking lot of an apartment complex shortly after midnight. *Id.* at 216, 491 S.E.2d at 722. The officer testified that he knew the apartment complex as an area of frequent narcotics trafficking and that he did not recognize the defendant, even though he knew most of the people who lived in the apartments. *Id.* There was also a lighted sign in the parking lot which read: "no trespassing." *Id.* The police officer also testified that the defendant attempted to leave the parking lot in her car as soon as the police vehicle came into the lot. *Id.* Our Supreme Court ruled that the officer's stop of the defendant's car as she drove away was not supported by a reasonable suspicion of criminal activity. "Although the automobile was parked in an area suspected of 'high narcotics' trafficking and it exited the parking lot upon [the officer's] arrival in a police vehicle, nothing about Ewell's conduct was suspicious." *Id.* at 217, 491 S.E.2d at 723.

We also reversed the defendant's conviction in *Goodwin*, 11 Va. App. at 367, 398 S.E.2d at 692. In *Goodwin*, the police saw the defendant in a "high crime" area walk out from behind some apartments and toward the street; when the defendant appeared to see the police car, he "jammed" his hand into his coat pocket. *Id.* at 365, 398 S.E.2d at 691. Despite not

having seen what the defendant had in his hand, the police officer approached him and told them he wanted to pat him down for weapons. *Id.* We held that the police lacked reasonable suspicion to make the stop. *Id.* at 367, 398 S.E.2d at 692.

In *Riley,* 13 Va. App. at 495, 412 S.E.2d at 725, the police observed the defendant exit a vehicle in a "high crime" area. After exiting the vehicle, the defendant turned his back to the police and made a motion toward his waistband. *Id.* The police officer testified that, though he did not see any object, he believed the defendant had a weapon. *Id.* We held the stop of the defendant violated the Fourth Amendment and reversed his conviction. "[The police officer] had no prior knowledge of Riley or his possible involvement in any criminal activity." *Id.* at 497, 412 S.E.2d at 726. We also held that a police officer had no reasonable suspicion to stop a person in a playground described as a high crime area when the police officer saw the man quickly thrust his hand into his pants when the officer approached in his car. *Smith v. Commonwealth,* 12 Va. App. 1100, 1104, 407 S.E.2d 49, 52 (1991).

Christian v. Commonwealth, 33 Va. App. 704, 536 S.E.2d 477 (2000), may be the decision of this Court that comes closest to suggesting that the criminal reputation of the area might have been decisive in the decision to uphold a *Terry* stop of an individual. Two undercover police officers were selling imitation controlled substances to people who walked by or drove through an apartment complex where there

had been many complaints of drug sales. *Id.* at 707, 536 S.E.2d at 479. The police officer assigned to protect the undercover officers noticed the defendant walking toward the apartment building holding a gun. *Id.* Even though it is not necessarily illegal to carry a gun, we held that the officer had a reasonable suspicion to stop the defendant and take his gun away. *Id.* at 714-15, 536 S.E.2d at 483.

> Here, police observed defendant suddenly appear, displaying a firearm, late at night, in an area notorious for "drug sales." Defendant's presence coincided with an ongoing police operation that involved several undercover officers in the sale of imitation illegal drugs, clearly an environment conducive to unlawful conduct and fraught with danger. . . . Confronted with such circumstances, police, experienced in the deadly mix of guns and narcotics and other violent crimes, reasonably suspected criminal activity which posed an immediate threat both to themselves and others, justifying a brief investigatory detention.

Id. While the decision does not expressly say so, I believe it demonstrates the way the "high crime" area factor is properly considered in the reasonable suspicion analysis. *Christian* identifies a situation in which suspicious activity (holding a gun), which might not justify a stop if the police witnessed it in some other place, justified a *Terry* stop because of where and when it occurred. It is difficult to imagine the Court upholding a *Terry* stop if the defendant in

Christian had been holding his gun while walking from his car into a recreational shooting range.

We find another clue as to the marginal significance of a "high crime" area by comparing *Goodwin* with *Moss v. Commonwealth,* 7 Va. App. 305, 373 S.E.2d 170 (1988). The facts of *Moss* were very similar to the facts of *Goodwin.* In both cases, we held that a *Terry* stop was not justified by the facts and reversed the defendant's conviction. *Goodwin,* 11 Va. App. at 367, 398 S.E.2d at 692; *Moss,* 7 Va. App. at 308, 373 S.E.2d at 172. However, the stop in *Moss* did not take place in a "high crime" area, while the stop in *Goodwin* did. The *Goodwin* opinion still described *Moss* as "a case based on comparable facts. . . ." *Goodwin,* 11 Va. App. at 366, 398 S.E.2d at 692.

> As in *Moss,* the police officers, relying on their experience and instincts, saw a suspect doing something with his hands. Based primarily on that action, which they considered suspicious, they stopped the suspect. While the police are regularly required to rely on their experience and instincts, the fourth amendment requires, at a minimum, that they possess articulable facts giving rise to reasonable suspicion of criminal activity before depriving a citizen of his or her privacy or freedom of movement.

Id. at 367, 398 S.E.2d at 692.

Parsing our prior "high crime" area cases we can conclude that a defendant's presence in a high crime

area has been marginally significant if accompanied by multiple hand transfers explained to be suggestive of drug dealing by experienced officers. *See Kidd,* 38 Va. App. 433, 565 S.E.2d 337. It has been marginally significant in evaluating the behavior of someone obviously trying to hide something from the police. *See Walker,* 42 Va. App. 782, 595 S.E.2d 30. It has been highly significant if the person seized has a weapon or poses a clear danger to the police. *See Christian,* 33 Va. App. 704, 536 S.E.2d 477. At least one federal appeals court has also considered a "high crime area" significant in finding reasonable suspicion from the defendant's unexplained presence, very late at night, outside a group of closed commercial establishments. *See United States v. Briggman,* 931 F.2d 705 (11th Cir. 1991).

However, a defendant's presence in a "high crime" area has not been enough to justify a stop based on a "furtive movement" by a pedestrian where the police do not see a weapon or item of contraband. *See Riley,* 13 Va. App. 494, 412 S.E.2d 724; *Smith,* 12 Va. App. 1100, 407 S.E.2d 49; *Goodwin,* 11 Va. App. 363, 398 S.E.2d 690. Nor has a motorist's presence in such an area equated the motorist's leaving a parking lot upon the arrival of the police with reasonable suspicion to conduct a motor vehicle stop. *See Ewell,* 254 Va. 214, 491 S.E.2d 721. With these cases in mind, we can address the totality of the circumstances surrounding Officer Latchman's seizure of appellant with a greater sense of perspective.

THE TOTALITY OF THE CIRCUMSTANCES: THE MAJORITY'S ROBBERY HYPOTHESIS

While a specific offense of suspicion was never mentioned by Officer Latchman, the trial judge, or the attorney general, the majority claims to have discerned from the circumstances a reasonable suspicion that appellant was planning to commit a robbery within the Citgo station. I believe this conclusion is untenable. By the time the majority reaches its conclusion, the factors they find worth mentioning have grown from three to five. These are, "the time of day, the location of Rudolph's vehicle in relation to the gas station, the recent history of burglaries and robberies at that location, Rudolph's movements in that vehicle, and Rudolph's attempt to leave after a marked police vehicle pulled out from behind him . . . ," *ante* at 8.

The majority's first concern, the time of day, might be suspicious if the Citgo station had been closed. *See Raab v. Commonwealth,* 49 Va. App. 638, 644 S.E.2d 78 (2007); *Briggman,* 931 F.2d 705. Since the station was open and customers were still coming in and out, it is difficult to see how the time of day adds anything to the objective circumstances of suspicion, and the majority makes no attempt to explain why it would. The majority also fails to explain what it was about the position of appellant's car that suggested a robbery attempt. If the majority means that the car was parked next to a locked door that was not used by patrons during the evening, then their decision violates the rule that we evaluate

a seizure based on the facts known to the officer at the time of the seizure. *Wells v. Commonwealth*, 6 Va. App. 541, 550, 371 S.E.2d 19, 23-24 (1988) (citing *Terry*, 392 U.S. at 21-22). Officer Latchman had no knowledge that the door near appellant was locked at the time he made the stop. Of the two other comments the majority makes about appellant's car's position, neither suggests an impending robbery. The officer stated he found it unusual that appellant had not used a marked parking space. But the majority fails to explain why parking as appellant parked would suggest to a reasonable person that appellant was preparing a robbery. Why would a robber be less likely to use a marked space than a customer? As for the majority's "easy getaway" characterization of appellant's parking place, the presence of the speed bump in the path of appellant's car seriously weakens their theory.

In light of our prior cases, the majority's reliance on appellant's "furtive movement," even when combined with the characteristics of the Citgo station, does not rise to the level of reasonable suspicion. In *Riley*, *Goodwin*, and *Smith*, we reversed findings of reasonable suspicion supported by "furtive movements" by pedestrians in "high crime" areas when the officer did not see a weapon or item of contraband before making the stop. *Riley*, 13 Va. App. at 499, 412 S.E.2d at 727; *Smith*, 12 Va. App. at 1104, 407 S.E.2d at 52; *Goodwin*, 11 Va. App. at 367, 398 S.E.2d at 692. Unlike the officer in *Christian*, Officer Latchman did not see a weapon. *Christian*, 33 Va.

App. at 707, 536 S.E.2d at 479. The only clear difference between this line of cases and Officer Latchman's stop of appellant is that appellant's movement took place inside a vehicle. *Asble,* although it did not take place in a "high crime" area, held that this kind of "furtive movement" inside a vehicle was not sufficient to justify a *Terry* stop. 50 Va. App. at 649, 653 S.E.2d at 288. The text of the decision does not suggest that *Asble* was a particularly close case. "This was, *at best, a mere hunch,* not a particularized suspicion flowing reasonably from articulable facts." *Id.* (emphasis added). Moreover, there is nothing the least bit suspicious about being in an automobile in the parking lot of a gas station/convenience store. Common experience suggests that it is ordinary for patrons of these establishments to be in cars and that most leave quickly after only stopping for a short period and making their purchases.

The majority's defense of its robbery hypothesis does not compare this case with any other case applying reasonable suspicion analysis to a police officer's theory that a suspect was planning a robbery. In *Glover v. Commonwealth,* 3 Va. App. 152, 154, 348 S.E.2d 434, 436 (1986), a police officer noticed a man sitting in his car outside a 7-11 store for about fifteen minutes before going inside.

> Once Glover was inside the store, the officer observed that he was watching the cash register and was looking at the customers in the store. Since Glover appeared to be lost, [the officer] asked him if he could be of

assistance. He stated "that he was trying to locate a friend up on Jordan Street but didn't know what location." [The officer] got a map to point out the street location, but Glover, who had on a blue jogging suit, seemed more interested in the cash register than where he wanted to go. The officer noticed that Glover was sweating heavily and was nervous. Glover also pointed out to [the officer] a couple in the store and stated that they followed him into the store and that they were after him. [The officer] thought this was suspicious because he had observed the couple in the store before Glover arrived.

Glover returned to his car, sitting in the driver's seat, where he remained for ten to fifteen minutes. He then returned to the store. The officer approached Glover again to talk with him. Again, Glover commenced to sweat heavily, acted nervous, and looked around the store. Glover purchased a soft drink and returned to the car, where he remained.

[The officer] had noted a District of Columbia license plate on the car. He testified that: "I had a feeling that subject was a person of suspicious activity, feeling that he might be wanting to rob the store." He checked the license number and found that the vehicle was owned by Bridget Thomas. He called the police department, requested a backup, and went to the parking area to investigate further.

> As he approached Glover's vehicle, [the officer] noted that Glover was in the driver's seat with his right hand in a blue gym bag which was sitting on the passenger's seat beside him. Glover slowly took his hand out of the bag as [the officer] approached and [the officer] stated that he did not see anything in Glover's hand as he removed it from the gym bag. Glover acknowledged that the vehicle was registered to Bridget Thomas. He called her on the telephone, and [the officer] spoke with her and confirmed that Glover had permission to drive the vehicle. A second police officer arrived and was instructed by [the first officer] to watch Glover while he went to search the car.

Id. at 154-55, 348 S.E.2d at 436-37.

This Court held that the officer had a reasonable suspicion to conduct a stop based on his observations. *Id.* at 157, 348 S.E.2d at 438. Though the officer did not observe the defendant do anything illegal, this Court noted that the defendant's behavior in the store was unusual and that it was also unusual that he did not drive away after leaving the store and returning to his car. *Id.* In this case, the majority considers appellant's driving away from a gas station/ convenience store to be a fact that strengthens their robbery hypothesis. I do not accept this reasoning in light of our comments in *Glover*, suggesting that it was suspicious that the defendant did *not* drive away after returning to his car.

Under the totality of the circumstances, appellant's behavior was much less suggestive of a robbery attempt than the behavior the officer witnessed in *Glover*. In *Glover*, the police officer carefully observed the defendant's strange, albeit legal, behavior for an extended period before conducting a *Terry* stop. *See also Terry*, 392 U.S. at 23 (officer observed two men "over an extended period of time" walking past and staring into same store window 24 times). In this case, Officer Latchman observed appellant "for a few seconds" before stopping him. Whether Officer Latchman might eventually have developed a reasonable suspicion to stop appellant's car had he carefully observed appellant's movements at greater length we will, of course, never know. I do not suggest that a few seconds of observation will never be enough to justify the stop of a vehicle. Clearly it depends on the specific facts the officer can articulate. If, for example, Officer Latchman had testified that he had seen appellant holding a firearm through the window of the vehicle, then *Christian* suggests a *Terry* stop would be appropriate. But nothing like that happened here.

The majority also mentions appellant's driving away as adding to the circumstances of suspicion. This conclusion seems inconsistent with our approach in *Glover*, as I have already explained. It is also counter-intuitive on its face. How does driving away from a Citgo station strengthen the conclusion that the driver is planning to commit a robbery within the station? Presumably, the majority would answer that

it was suspicious to leave after seeing the officer. But this answer is unsatisfactory. Surely the vast majority of motorists leaving gas stations do so because they have finished their business, not to flee the police. Officer Latchman was not well positioned to say otherwise after observing appellant only for "a few seconds." His testimony provided no evidence that appellant even noticed Officer Latchman before driving away. Moreover, prior cases have reversed stops of motorists who seemed as though they were avoiding police officers in cases where that inference was considerably stronger than it is here. *See Bass v. Commonwealth,* 259 Va. 470, 525 S.E.2d 921 (2000) (suppressing fruits of illegal stop of motorist who turned off of a street where police were conducting a sobriety checkpoint and into gas station parking lot without stopping for gas before turning onto perpendicular street, thus avoiding checkpoint). *See also Murphy v. Commonwealth,* 9 Va. App. 139, 384 S.E.2d 125 (1989).

Finally, Officer Latchman testified that he stopped appellant's car after he "observed the vehicle *start* moving away." (Emphasis added). Officer Latchman initiated the stop of appellant's car, "before he left the lot." This language from the testimony suggests that appellant was still within the parking lot of the Citgo station at the time Officer Latchman stopped him. For all Officer Latchman knew, appellant might not have been leaving the lot. He might have been moving his car toward one of the gasoline pumps. Thus, the majority is not merely

mistaken in the emphasis they assign to appellant's leaving the parking lot. They are incorrect in determining that the record before us even supports a conclusion that this is what appellant was doing.

A RESPONSE TO THE MAJORITY'S CONCERNS ABOUT THE REASONABLE SUSPICION STANDARD

Without analogizing this case to any prior decision finding reasonable suspicion in similar circumstances, the majority asserts that, "[t]o require a level of suspicion greater than that present in this case would be to effectively replace the requirement of reasonable suspicion with the higher standard of probable cause." *Ante* at 4-5. However, all of the following decisions expressly apply a reasonable suspicion analysis, not a probable cause analysis. *Briggman*, 931 F.2d at 709; *Bass*, 259 Va. at 477, 525 S.E.2d at 924; *Ewell*, 254 Va. at 217, 491 S.E.2d at 722; *Asble*, 50 Va. App. at 647-49, 653 S.E.2d at 287-88; *Raab*, 49 Va. App. at 642-43, 644 S.E.2d at 80; *Walker*, 42 Va. App. at 790, 595 S.E.2d at 34; *Kidd*, 38 Va. App. at 443, 565 S.E.2d at 342; *Christian*, 33 Va. App. at 714-15, 536 S.E.2d at 483; *Riley*, 13 Va. App. at 496-97, 412 S.E.2d at 725-26; *Smith*, 12 Va. App. at 1102-03, 407 S.E.2d at 51; *Goodwin*, 11 Va. App. at 366, 398 S.E.2d at 691-92; *Moss*, 7 Va. App. at 308, 373 S.E.2d at 172; *Glover*, 3 Va. App. at 155, 348 S.E.2d at 437.

I have also mentioned that Officer Latchman did not mention the particular crime that he suspected appellant of committing. The majority's footnote 3 *ante* takes this to mean that I consider the subjective opinions of the police officer to control the reasonable suspicion inquiry. This is incorrect. Our decision in *Asble,* which, as I have already explained, expressly applied the objective standard of reasonable suspicion, mentioned that, " "[The police officer] identified no criminal activity of which he suspected Asble." *Id.* at 649, 653 S.E.2d at 288. And *Asble* is not the only precedent mentioning "the character of the offense under suspicion" as a relevant factor in the reasonable suspicion analysis. *Christian,* 33 Va. App. at 714, 536 S.E.2d at 482. *See also Welsh v. Wisconsin,* 466 U.S. 740 (1984) (holding some offenses may be so minor as to make it unreasonable for police to undertake searches that would be constitutionally permissible if graver offenses were suspected).

It is true that the police need not always suspect the person stopped of a particular crime for the stop to be justified. *Hatcher v. Commonwealth,* 14 Va. App. 487, 490, 419 S.E.2d 256, 258 (1992). But a careful review of the way we have applied this language from *Hatcher* convinces me that permissible *Terry* stops by police officers unable to articulate a particular "offense under suspicion" have generally involved flight or other obviously evasive behavior by the suspect upon encountering the police. *Walker,* 42 Va. App. 782, 595 S.E.2d 30 (appellant became nervous at the approach of police officers and tried to put

something in his hand into the rear pocket of a woman standing to his left who refused to accept it); *Alston v. Commonwealth*, 40 Va. App. 728, 581 S.E.2d 245 (2003) (when police officers approached defendant in an apartment complex, defendant drove out of the parking lot with passenger officer knew was banned from apartment complex, defendant indicated with turn signal that he would make a left turn out of the parking lot, then made abrupt right turn, pulled to the side of the road and started walking away); *Hatcher*, 14 Va. App. 487, 419 S.E.2d 256 (defendant drove past officer at high speed at midnight; when officer pursued defendant, defendant turned abruptly into a side street, turned off headlights, and walked about 25 feet away from the car before officer told him to stop).

Terry itself, which also applies an objective standard, emphasizes the importance of the specific offense of suspicion to meaningful judicial review. "This demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry* 392 U.S. at 21 n.18.

CONCLUSION

Instead of enforcing *Terry's* "demand for specificity," the majority holds that Officer Latchman developed reasonable suspicion, despite the vagueness of his testimony: "I don't know if he was looking around for something or what else was going

on in the vehicle at the time." And it is worth repeating that they do not describe a single decision upholding a *Terry* stop under similar facts.

Reaching inside of a car in a gas station parking lot while the station is open for business is not suspicious. It is simply too ubiquitous and too innocent an action to justify a seizure under the Fourth Amendment without some other strong circumstance of suspicion.

> *Terry* does not say that seizures may be undertaken with respect to all "ambiguous" conduct; rather, *Terry* is grounded in the proposition that there is "no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails." Surely this balancing process, on the invasion side must take into account not only the extent of the seizure of the particular suspect stopped, but also the degree of risk to innocent persons generally if seizures upon this magnitude of suspicion are regularly permitted. Surely that is what the Court meant when it said in *United States v. Sokolow,* 490 U.S. 1, 10 (1989), that "the relevant inquiry" is into the "degree of suspicion that attaches to particular types of noncriminal acts."

Wayne R. LaFave, *Search and Seizure* § 9.5(f), at 526 (4th ed. 2004). Succinctly stated, the confluence of circumstances does not here arise to generate a reasonable, articulable suspicion of criminal activity.

I believe the trial court erred in failing to grant appellant's motion to suppress. I respectfully dissent.

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: JANUARY 9, 2007
JUDGE: SHOCKLEY

COMMONWEALTH OF VIRGINIA
vs
DEMETRES JERROD RUDOLPH, DEFENDANT

Case Number:
CR05-2762 & CR06-1036

SENTENCING ORDER

Attorney for the Commonwealth: E. Gaines & R. Reel
Attorney for the Defendant: M. Glaubke
Court Reporter: Ronald Graham and Associates, Inc.

The defendant was present and represented by counsel.

On September 27, 2006, the defendant was found GUILTY of the following offense(s):

OFFENSE DESCRIPTION	OFFENSE DATE	VA. CODE SECTION	VA.CRIME CODE REFERENCE
POSSESSION OF MARIJUANA WITH THE INTENT TO DISTRIBUTE	01-23-06	18.2-248.1 18.2-10	NAR-3032-F5

AND

On December 13, 2006, the defendant was found GUILTY of the following offense(s):

OFFENSE DESCRIPTION	OFFENSE DATE	VA. CODE SECTION	VA.CRIME CODE REFERENCE
DISTURBING THE PEACE	07-31-04	23-10	
MANUFACTURE, SELL, DISTRIBUTE OR POSSESS A CONTROLLED SUBSTANCE WITH THE INTENT TO MANUFACTURE, SELL OR DISTRIBUTE	07-31-04	18.2-248 54.1-3446 THROUGH 54.1-3452	NAR-3032-F9

The presentence report was considered and filed as part of the record in accordance with the provisions of Code § 19.2-299.

A Statewide Community-Based Corrections System Report was filed.

Pursuant to the provisions of Code § 19.2-298.01 the applicable discretionary sentencing guidelines and the guidelines worksheets were reviewed and considered by the Court and are ordered filed as part of the record.

Before pronouncing the sentence, the Court inquired if the defendant desired to make a statement and if the defendant desired to advance any reason why judgment should not be pronounced.

The Court **SENTENCES** the defendant to:

Incarceration in the Virginia Department of Corrections for the term of: 5 years on the charge Manufacture, Sell, Distribute or Possess a Controlled Substance with Intent to Manufacture, Sell or Distribute and 7 years on the charge of Possession of Marijuana with the intent to Distribute.

Incarceration in the jail of this City for the term of: 12 months on the charge of Disturb the Peace.

The 12 month sentence imposed on the charge of Disturb the Peace shall run concurrently with the sentences imposed on the charges of Manufacture, Sell, Distribute or Possess a Controlled Substance with Intent to Manufacture, Sell or Distribute and Possession of Marijuana with the Intent to Distribute.

The total sentence imposed is 12 years.

The Court **SUSPENDS ALL BUT 1 YEAR** of the 5 year sentence imposed on the charge of **Manufacture, Sell, Distribute or Possess a Controlled Substance with Intent to Manufacture, Sell or Distribute** and **ALL BUT 1 YEAR** of the 7 year sentence imposed on the charge of **Possession of Marijuana**

with the Intent to Distribute on the following condition(s):

Good Behavior. The defendant shall be of good behavior for 12 years.

Supervised Probation. The defendant is placed on Supervised Probation and the defendant shall comply with all the rules and requirements set by the Probation Officer. LENGTH OF PROBATION: Until released by the Probation Officer. PROBATION TO BEGIN: Upon release from confinement.

Forfeiture, restricted license for drug charge: Pursuant to § 18.2-259.1 the defendant's privilege to drive or operate a motor vehicle, engine, or train in the Commonwealth is forfeited for a period of six months on the charge of Manufacture, Sell, Distribute or Possess a Controlled Substance with Intent to Manufacture, Sell or Distribute and six months on the charge of Possession of Marijuana with the Intent to Distribute. The defendant shall surrender his or her driver's license to be disposed of in accordance with the provisions of 46.2-398, and the clerk shall provide a copy of this order to the Department of Motor Vehicles.

Pursuant subsection C of § 18.2-259.1 the court provides that, if and when the defendant is otherwise eligible, the Commissioner of the Department of Motor Vehicles issue, upon request of the defendant, a restricted license for the following purposes (after receipt of a restricted license, the defendant shall carry a copy of this order, the restricted license and

any required written verification, at all times while operating a motor vehicle):

- travel to and from place of employment.
- travel during the hours of such person's employment if the operation of a motor vehicle is a necessary incident of such employment.
- travel for health care services, including medically necessary transportation of an elderly parent with a serious medical problem upon written verification of need by a licensed health professional.
- travel to and from court appearances in which the defendant is a subpoenaed witness or a party and appointments with a probation officer and to and from any programs required by the court or as a condition of probation.

Substance abuse screening and assessment for felony convictions pursuant to § 18.2-251.01: If the defendant has been convicted of a felony offense, not a capital offense, committed on or after January 1, 2000, the defendant shall complete any substance abuse screening, assessment, testing, and treatment as directed by the Department of Corrections as part of the defendant's sentence.

Distribution of copies:

The Clerk shall send a copy of this order to the:

Sheriff
Department of Corrections
Probation Office of this Court
Department of Motor Vehicles

Costs. The defendant shall pay costs pursuant to § 19.2-354.

Credit for time served. The defendant shall be given credit for time spent in confinement while awaiting trial pursuant to Code § 53.1-187.

The Court further ORDERS that attorney M. Glaubke, is appointed for appeal purposes for the defendant on the charge of Possession of Marijuana with the Intent to Distribute in file CR06-1036.

DATE: 1/19/07

ENTER /s/ AB Shockley
JUDGE

Sentencing Summary:
TOTAL SENTENCE IMPOSED: 12 YEARS
ACTIVE TIME TO SERVE: 2 YEARS

Defendant Identification:
SSN: [Social Security Number Omitted]
DOB: [Date Of Birth Omitted]
SEX: MALE

Initials of Clerk: vbm

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

HEARING DATE: SEPTEMBER 27, 2006
JUDGE: SHOCKLEY

COMMONWEALTH OF VIRGINIA
vs Case No.: CR06-1036
DEMETRES JERROD RUDOLPH, DEFENDANT

Court Reporter: Fiduciary Reporting, Inc.

This day came R. Reel, attorney for the Commonwealth, the defendant, in person, and M. Galubke, attorney for the defendant.

Conditional Guilty Plea:

The defendant entered a conditional guilty plea pursuant to §19.2-254.

Upon the defendant's GUILTY PLEA and the stipulated evidence, the Court found the defendant GUILTY of the following offense(s):

OFFENSE DESCRIPTION	OFFENSE DATE	VA. CODE SECTION	VA.CRIME CODE REFERENCE
POSSESSION OF MARIJUANA WITH THE INTENT TO DISTRIBUTE	01-23-06	18.2-248.1	NAR-3032-F5

Referral for Report

The Court directed a probation officer of this court to prepare a presentence report. Without objection from the defendant or the attorney for the Commonwealth, the court, as provided in § 19.2-299(A), ordered that the report contain no more than the defendant's criminal history, any history of substance abuse, any physical or health-related problems as may be pertinent and any applicable sentencing guidelines worksheets.

The report shall include a report on the defendant's suitability for participation in the Statewide Community-Based Corrections System.

The Court continued further proceedings to November 29, 2006.

Substance Abuse Screening and Assessment for felony Convictions: If the defendant has been convicted of a felony, not a capital offense, committed on or after January 1, 2000, the defendant shall undergo a substance abuse screening pursuant to § 18.2-251.01 as directed by the Probation Office. The results of the screening and assessment if indicated shall be included in the presentence report pursuant to § 19.2-299(D).

Copy Distribution:

The Clerk shall send a copy of this order to the:

Probation Office of this Court.

Sheriff of this City. The Sheriff shall transport the defendant, if in custody, to sites designated by DOC for purposes of evaluation.

DATE: 9/29/06

ENTERED /s/ AB Shockley
JUDGE

Defendant Identification:
SSN: [Social Security Number Omitted]
DOB: [Date Of Birth Omitted]

Initials of Clerk: vbm

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 24th day of April, 2009.

Demetres Jerrod Rudolph, Appellant,

against Record No. 080794
Court of Appeals No. 0240-07-1

Commonwealth of Virginia, Appellee.

Upon a Petition for Rehearing

On consideration of the petition of the appellee to set aside the judgment rendered herein on the 27th day of February, 2009 and grant a rehearing thereof, the prayer of the said petition is denied.

Justice Millette took no part in the consideration of this case.

A Copy,

Teste:

Patricia L. Harrington, Clerk

By: *original order signed by a deputy clerk of the Supreme Court of Virginia at the direction of the Court*

Deputy Clerk